Vol. V

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1943

No. 195

NORTHWESTERN ELECTRIC COMPANY AND AMERICAN POWER & LIGHT COMPANY, PETITIONERS,

vs.

FEDERAL POWER COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 23, 1943.

CERTIORARI GRANTED OCTOBER 11, 1943.

No. 10161

United States

Circuit Court of Appeals

For the Ninth Circuit.

NORTHWESTERN ELECTRIC COMPANY and
AMERICAN POWER & LIGHT COMPANY,
Petitioners,

vs.

FEDERAL POWER COMMISSION,
Respondent.

Transcript of the Record

In Five Volumes

VOLUME V

Pages 829 to 1225

Upon Petition to Review an Order of the Federal Power Commission

ROTARY COLORPRINT, 590 FOLSOM ST., SAN FRANCISCO

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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TESTIMONY

Hearing Room 704 United States Courthouse Building

Portland, Oregon

Monday, March 3, 1940

Hearing of the above-entitled matter came on for hearing pursuant to notice at 9:30 o'clock a. m.

Before: Glen R. Law, Trial Examiner. [1180]

Mr. Laing: Mr. Examiner, before we proceed further I should like to inquire as to the state of the record insofar as it relates to the testimony and exhibits presented at the earlier hearing in this cause. Are we to assume that the testimony and exhibits already presented are part of this record and may be relied upon and referred to in any manner that has to do with this particular proceeding?

Mr. Slaff: I should presume so, certainly.

Mr. Laing: The reason for that is that, normally, we would take up,—We would assume these as part of the record.

The Trial Examiner: While that is true to an extent I would say this: That in view of the fact that not all the matters which were before the Commission in the previous hearing are before the Commission in this rehearing, I would suggest that counsel on both sides expressly make reference to the pages of transcript and to the exhibits which

they consider relevant to this particular proceeding.

Mr. Laing: Well, you mean we may do that when we file [1201] our arguments or briefs?

The Trial Examiner: No, I would like to have that done during the hearing, if possible, before the hearing is closed.

Mr. Laing: I shall have to take a little time off and analyze the record for that purpose, but we can do that, of course.

The Trial Examiner: I would like to have it as we go along so that it wouldn't be necessary to wait until your briefs are filed.

Mr. Laing: We may have to spend two or three hours analyzing the record with that particular point in view.

Mr. Priest: From time to time we may be delayed a little in order to be sure in making exact and specific references to the record, your Honor.

The Trial Examiner: Well, I don't say that it is necessary in referring to the items particularly that you do that, but before the close of the hearing I would want you to state expressly what parts of the record you consider relevant and material to the particular point of this hearing. It is three and a half million dollars that we are talking about in this hearing.

Mr. Laing: I should like to ask also, Mr. Examiner, if there may not be read into this record at this time the stay order that was entered by the Circuit Court of Appeals in San Francisco on Friday? I should like to see that read into [1202] the

record to make clear just what the status of the proceeding is at the present time so far as the accounting disposition of some of these matters, is concerned.

The Trial Examiner: Do you wish to present that as an exhibit or——

Mr. Slaff: I don't think it particularly relevant to this proceeding but I have no objection to its being read into the record.

Mr. Laing: It presents part of the background of the proceedings in the same way as your orders do. At least it tells us what the status of the Northwestern's obligation is in regard to the time of making those entries.

The Trial Examiner: I may say that here the question before us is the matter of disposition.

Mr. Priest: We intend to predicate an objection at least in part upon this order, Mr. Examiner. We should like, therefore, at least for that purpose to have it in the record.

The Trial Examiner: You'd like to introduce it in evidence?

Mr. Priest: Well, it doesn't make any difference how it gets in as long as it is a part of the record.

Mr. Laing: Have you any objection, Mr. Slaff, to our reading this?

Mr. Slaff: No, I have no objection. As I say, it is nothing particularly relevant, but I have no objection. [1203]

The Trial Examiner: You may proceed.

Mr. Laing: (Reading) "At a stated term, to wit: The October Term 1940, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Friday the twenty-eighth day of February in the year of our Lord one thousand nine hundred and forty-one.

Present: Honorable Curtis D. Wilbur, Senior Circuit Judge, Presiding.

Honorable Francis A. Garrecht, Circuit Judge.

Honorable William Healy, Circuit Judge.

No. 9756

NORTHWESTERN ELECTRIC COMPANY,

Petitioner,

vs.

FEDERAL POWER COMMISSION,

Respondent.

ORDER GRANTING STAY

"Upon the written motion of Messrs. John A. Laing, Henry S. Gray, A. J. G. Priest and Sidman I. Barber, attorneys for Northwestern Electric Company, and it appearing to the Court that no harm can result to either party or to the public interest therefrom and good cause therefor appearing, it is ordered that paragraphs (1), 2(b), 2(c) and (3) of the order of the Federal Power Commission dated December 6, 1940 and issued by that Commission on December 11, 1940 in that certain

pro- [1204] ceeding bearing said Commission's Docket Number IT-5642, being the order of said Commission for the review of which a petition was filed in this Court on February 21, 1941, by said Northwestern Electric Company, be, and hereby are stayed during the pendency of the appeal effected by said petition for the review thereof and to and including the issuance of the certified copy of the decree of this Court herein, if said order shall not have been set aside or annulled by the judgment or decree of this Court; provided, however, that during the period of the stay granted hereby, said Northwestern Electric Company shall not declare or pay any dividends upon the Common Stock of said Company or make any other distribution with respect thereto,

"It appearing from the statement of George Slaff, Esq., counsel for the Federal Power Commission, that said Commission by its orders dated December 30, 1940, and January 21, 1941, stayed paragraph 2(a) of said order of said Commission dated December 6, 1940, subject to the condition as to dividends hereinbefore set forth, until further order of said Commission, nothing in this order contained shall stay said Commission from proceeding with the rehearing as to said paragraph 2(a) of said order of December 6, 1940, which was directed to be held by its said order of January 21, 1941, or from making any order with respect thereto which it deems appropriate, or shall prejudice the right of Northwestern Electric Company to [1205] apply to this Court for such relief as said

Company deems appropriate in the event said Commission shall enter any such order with respect to the subject matter of said paragraph 2(a)."

Then, there follows the certificate of the clerk that this is a copy of an order made and entered in this cause on the 28th day of February, 1941.

Mr. Laing: At this time, Mr. Examiner, we should like if possible to be informed more clearly with respect to the exact scope of the hearing that is to be had pursuant to the order of January 21.

I might say it is a part of my question, the order says in plain enough language that the hearing is to be held "for the purpose of permitting the presentation of a plan of disposition of the amount of $3,500,000 write-up which the Commission, in Paragraph 2(a) of its Order of December 6, 1940 ordered Northwestern Electric Company to make disposition of." If by "final disposition" there is included a plan, and evidence in support thereof, that the proper disposition of any sum, or any part of that three million five hundred thousand dollars which ultimately goes into Account 107, is that it shall be retained in that account, because it represents value in the property which should not be written off or disposed of in that sense, then that is our plan of disposition. [1206]

In support of that plan of disposition we expect to offer in this proceeding evidence to show that all and every part of that three and a half million dollars that is referred to, that may enter into Account 107, does represent actual value in the property. If the Commission takes the view that the

only kind of a plan of disposition which it might be interested in receiving, or which it would listen to in this rehearing, is a plan which involves the writing-off of the three and one-half million or any part of it from Account 107, then I would say that the Northwestern has no plan of disposition of that kind to present, and is not interested in a discussion of that plan except to establish, as we believe we can establish, either in this proceeding or at some stage of the game, that such disposition would be unlawful and improper.

Now, I would like to ask at this time whether it is the understanding of the Examiner that we are confined to the presentation of a plan of disposition that involves the so-called writing-off of this three and a half million or any part of it that goes into Account 107, or whether we are permitted to present a plan which involves the disposing of it in the sense of retaining it in Account 107, for the reason that, as we will expect to show, the value of the assets of the company requires it to be so retained.

The Trial Examiner: Well, do I understand counsel to [1207] say that in the sense of valuable consideration paid by the company for this three and a half million, or some part of it, or do I understand counsel to mean value in the more general sense of some value that might exist in the mind of stockholders?

Mr. Laing: Perhaps I can answer the question this way, Mr. Examiner. Our objection and our

position in reference to the retaining of any part of that sum that goes into Account 107 is based generally upon the ground that the present value of the assets of the company is such as to preclude the writing-off of any part of that three and a half million dollars from Account 107. Now, that present value is made up of all the elements of value that have to do with the assets of the company. It includes such values as the company received from the issuance of the stock in the first instance; but it is not confined to any claim that the company received three and a half million of value from Fleishackers, or the common stockholders at the time the stock was issued. It is not limited to that. It is based upon, or rather it comprehends, the entire asset side of the company's balance sheet at the present time and the properties and assets that stand for its securities. [1208]

The Trial Examiner: Upon what particular part of the accounting system of the Federal Power Commission does counsel base his claim to the right to do this?

Mr. Laing: Well, we are predicating our claim as to the right to maintain our assets on the asset side of our balance sheet upon the broad fundamental principle that that is our lawful right in the premises, and whatever there may be in the accounting system of the Federal Power Commission for the purpose of classifying or putting tags on particular expenditures or accounting transactions, that that does not carry with it—I mean, there is nothing in the Commission's own account-

ing system which constitutes legislation from the source from which legislation arises that gives the Commission the power to compel the Company to write off its assets if they are bona fide and legitimate assets, accounting system or no accounting system.

The accounting system is nothing more than an order or regulation of the Commission itself.

The Trial Examiner: In other words, you question the right of the Commission to base the accounting upon original cost, is that it?

Mr. Laing: I question the right of the Commission, Mr. Examiner, to require the Company to write off any of its legitimate assets merely because, on the Commission's theory of the original cost, the asset can not be matched by what the [1209] Commission regards as an original cost item. In other words, I think there may be some difference in the argument as to the right of the Commission by any accounting system to classify expenditures and to put various labels, classify them in various accounts as to how they originated and have them so listed.

In other words, the right of the Commission to classify expenditures on the basis of original cost may be one thing. The right of the Commission, having done that, to compel the accounting company to write off any of those items that have been tagged in a particular account, represents an altogether different interference on the part of the Federal Power Commission and in our judgment constitutes, where there is a legitimate asset repre-

sented by that item—represents an unlawful invasion of our property and Constitutional rights.

I think the two things stand in different categories, Mr. Examiner. The right to classify is one thing and the right to compel you to dispose of something which you have every reason to believe and are prepared to show is a legitimate asset, is something else. I think that is what the Supreme Court held in the Telephone case.

Mr. Slaff: I have very little to add but I would like to make one observation. As far as this rehearing is concerned we must start with the premise which exists, that the Commission has found this three and a half million dollars to [1210] be a write-up, to be an inflationary item. That is the finding in Commission's Opinion 56 and in the Order based on that. That is what we start with; and the only thing with which this hearing is concerned is, as the Commission points out, a rehearing for the purpose only of presenting a plan of disposition of this amount of three and a half million dollars.

I don't think anything else can possibly be involved. We must begin with that premise, with that finding, and hold the rehearing solely for the purpose set out in the order.

Mr. Laing: Well, the question, Mr. Slaff, is how large an area or territory does the word "disposition" comprehend. If the Commission takes the view that "disposition" means something different from retaining in the account, why then our position is very clear.

The Trial Examiner: Well, let's go ahead and see. The Examiner is inclined to take the position that the purpose of this hearing, which is in the nature of a rehearing, is to deal with the disposition to be made of the three and a half million dollars. In view of the previous finding and order that that is in the nature of a write-up, I believe that the Commission would be interested, if properly presented, in evidence as to any actual consideration which may have entered into it. But to base any change on the broad general market value or something like that of all the assets of the Northwestern Electric [1211] would be to go way beyond the principles of the accounting system.

Mr. Laing: Well, Mr. Examiner, are we to understand, then, that the word "disposition" as employed in this order precludes a plan that involves the permanent retention of that three and a half million dollars or any part of it in the account? I will say frankly that is the only plan that the Northwestern Company has.

The Trial Examiner: In other words you propose a plan to retain that?

Mr. Laing: That is right.

The Trial Examiner: And what you propose is to show reasons why it should be retained? In other words——

Mr. Laing: Value.

The Trial Examiner: Not actual cost, however.

Mr. Priest: What was that, Mr. Examiner?

The Trial Examiner: I say not actual cost, however.

Mr. Laing: Not based on so-called original cost, no.

Mr. Slaff: Mr. Examiner, if I may observe, isn't this sort of more or less academic at this point? Can't we go ahead with the rehearing and meet these problems as they come up they are problems?

The Trial Examiner: Well, unless counsel feels that this rehearing depends entirely upon this one question.

Mr. Priest: Well, Mr. Examiner, what we'd like to know [1212] is whether or not we are going to have an opportunity at this hearing to present evidence upon the question of whether—and I quote—"The difference between original and present cost is a true increment of value."

Mr. Slaff: Are you using present cost in the sense of reproduction cost?

Mr. Priest: I am using present cost in the sense of reproduction value, that is right, Mr. Slaff.

The Trial Examiner: Aren't you getting in there more a question of law than of evidence?

Mr. Priest: We aren't limited, you understand, to present reproduction cost. We are referring to present cost as covering the whole extent of value.

The Trial Examiner: Counsel will address the Chair.

Mr. Priest: I beg pardon. I was attempting to answer counsel's question. He inquired what I meant by present cost. I meant all criteria that enter into present values. I beg your Honor's pardon.

Mr. Laing: Mr. Chairman, if you wish we may proceed. It occurred to me that we would perhaps clear the air a little bit if at the outset we could be informed further as to this rehearing, which is primarily and specially called for the purpose of considering and permitting the presentation of a plan of disposition of any part of this three and a half million in Account 107. If that means a disposition in the sense of [1213] writing the amount out of that account, then we have no plan of disposition to present, and the issue in the proceeding is very considerably simplified.

If a plan of disposition is broad enough to include presentation of reasons, based on the value of the assets, why in our judgment none of that amount that ever gets into Account 107 should be written off, why, then we are prepared to go ahead.

The Trial Examiner: I think it would be in order in connection with the disposition to show the background of your reasoning. To what extent certain evidence of values may be admissible or may be relevant to the determination of the issue before the Federal Power Commission is something that can only arise with specific evidence.

Mr. Laing: Very well.

Mr. Priest: If the Examiner please, let me inquire first whether in the case of adverse rulings by the Examiner both sides have an automatic exception? We understood from Mr. Gray, I believe, who presided at the previous hearing in this matter, that that was your practice.

The Trial Examiner: If that is your purpose expressed at the beginning of the hearing, that will be granted.

Mr. Priest: Is that satisfactory to counsel?

Mr. Slatt: Yes.

Mr. Priest: We would prefer not to encumber the record [1214] with the unnecessary taking of exceptions if we are not required to do so.

The Trial Examiner: That is very satisfactory. The reporter will note that fact. [1215]

Mr. Priest: If the Examiner please, American Power & Light Company now enters objections to the Federal Power Commission's proceeding at this hearing and at this time to hear or determine the matter of requiring the Northwestern Electric Company to charge off its books or in any way to dispose of the amount of $3,500,000, which the Commission in its Order of December 6, 1940 directed said Northwestern Electric Company (which I shall hereafter in this statement refer to as the "Company") to transfer to Account 107, provided for in the Commission's so-called Uniform System of Accounts for Public Utilities and Licensees, upon the following grounds:

1. That the Federal Power Act does not invest said Commission with authority or control over the general corporate and other fundamental accounts and records of the Company.

2. That the Federal Power Act does not authorize said Commission to require any disposition of said amount of $3,500,000 and that said Commis-

sion, in and by this proceeding is attempting to exercise powers which are not granted to it by any law.

3. That the Company is subject to comprehensive regulation by the authorities of the States of Washington and Oregon as to accounting, rates, adequacy of service, security issues, property acquisitions and dispositions, contracts [1216] with affiliated interests and every other aspect of its business which concerns the general public, and that the authority of the Federal Power Commission is limited by the Federal Power Act to such matters as are not subject to regulation of the States and, therefore, does not comprehend any such disposition.

4. That any such requirement of disposition is based upon a retrospective application of the Federal Power Act which is not provided for by the terms thereof and which ignores the property and property rights acquired by parties to this proceeding, particularly by American Power & Light Company, prior to the enactment of Parts II and III of the Federal Power Act.

5. That in and by this proceeding the Commission attempts to exercise judicial powers which are granted only to the courts of the several states and to determine contract rights and liabilities of the Company and its stockholders or to construe and enforce laws of the states which are subject to enforcement only in the courts thereof.

6. That the rights of American Power & Light

c. That the Commission is not authorized by the Act to determine the value of the property of the [1218] Company, and that determinations of value for the purpose of controlling the general corporate and other fundamental accounts of the Company may be made only under authority of state law.

d. That any such disposition is not a matter of accounting and involves determinations of value and matters of law, engineering and economics.

e. Without waiver of the foregoing objections, this intervenor further objects upon the ground that no order finally determining the plant account and other accounts of the Company has been made or entered.

8. That, as found by the Commission in its opinion of December 6, 1940, a disposition of said amount of $3,500,000 "is the equivalent of obtaining ultimately from the holders of the Common Stock a consideration of $3,500,000 for the Stock" and that American Power and Light Company, the present holder of such stock, acquired such stock from the holders thereof prior to the enactment of Parts II and III of the Federal Power Act and prior to the adoption by the Commission of its said Uniform System of Accounts, for value and without notice of any irregularity or lack of validity in the issuance thereof and free of any obligation to pay any additional amount therefor.

9. That any order of the Commission requir-

ing such disposition invades the powers served to the states by [1219] Article X of the Amendments to the Constitution of the United States and is contrary to law.

10. That any such disposition requires the writing off on Northwestern Electric Company's books and accounts of values inherent in its property and reflected in its present accounts and would thereby violate Article V of the Amendments to the Constitution of the United States and deprive the Company, and American Power & Light Company as the holder of its Common Stock, of property without due process of law and take their property for public use without just compensation.

11. That paragraphs (1), 2(b), 2(c) and (3) of the Commission's order dated December 6, 1940, requiring the Company, among other things, to transfer said amount of $3,500,000 to said Account 107, have been stayed, by order of the United States Circuit Court of Appeals for the Ninth Circuit entered on February 28, 1940, during the pendency of the appeal effected by the filing in said Court on February 21, 1940, of a petition for the review of the Commission's said order dated December 6, 1940; that any action which might be taken by the Commission in this proceeding is wholly contingent upon the judgment or decree which will be entered by said Court upon said appeal and that, therefore, all questions arising out of this proceeding presently are moot and any action taken or order entered [1220] by the Com-

mission in such proceeding would be in vacuo and ineffective.

Mr. Laing: Mr. Examiner, I should like to add on behalf of the Northwestern Electric Company, that these objections which have been made by Mr. Priest on behalf of the American Power & Light Company are likewise made in our own behalf, on behalf of the Northwestern Electric Company, with the exception that there are two articles or provisions of said objections Numbers 6 and 8 which relate peculiarly to the position of the American Power & Light Company, as to the status of their rights, and those provisions are not adopted as to the Northwestern.

Mr. Slaff: Mr. Examiner I do not believe these objections require any comment on our part, as to the matters set out in Nos. 1 to 10, because all of these, essentially, have been before the Commission already in the consideration of this case, and the Commission has acted in the light of all those objections already made.

With respect to the last objection, namely, that the Stay order in effect specifically stays this proceeding and that we would be acting in vacuo, the order itself provides that, "Nothing in this order contained shall stay the Commission from proceeding with the rehearing as to said Paragraph 2(a) or from making any order with respect thereto which it deems appropriate." So I do not think that there is [1221] any necessity for us to even make any argument on that. I think we may well go ahead on this rehearing at this time.

Mr. Laing: I might answer, in response to Mr. Slaff's comment on objection No. 11, that this motion is addressed to the discretion and judgment of the Commission itself. We recognize that the court has not stayed the Commission from proceeding with this rehearing, but that is quite a different thing from contending the Commission should not itself stay it for the reasons stated. The application to the Court was limited. It was limited to the protecting of the rights of the Northwestern pending the appeal that was taken and there was no application made to the Court in so many words for a stay of this proceeding. The mere fact that the order makes the provision that it shall not operate as a stay in this rehearing seems to me no argument against the Commission's receiving this motion seriously and sustaining the objection on the grounds as stated and presented by Mr. Priest.

Mr. Priest: I would like to add to that that thus far, no asset, neither said amount of $3,500,000 or any other amount has been transferred to Account 107, that presently there is nothing in Account 107 to be disposed of, and that it is altogether possible that there may never be any $3,500,000 transferred to Account 107, so the disposition of said amount of $3,500,000 if it is ever transferred to Account 107, depends upon the holding which may be [1222] entered ultimately by the Circuit Court of Appeals upon application for review of the Commission's Order of December 6, 1940, and therefore we are dealing with

a moot question, as we indicated, and it would be an act in vacuo for the Commission to proceed at this time.

The Trial Examiner: I think that the action of the Circuit Court of Appeals only suspends the operation of the order of the Federal Power Commission. There is no reason therefore that I can see why we should not proceed here with the determination of the facts upon the basis of that order even though its operation is suspended. The Commission may well determine, after the evidence is in, as to the purport of the evidence pertaining to that, to suspend any action or the issuance of any order as a result of this hearing until they have learned the result of the action on the appeal. However, there is no reason that that should result in any postponement of this hearing, especially in view of the lateness of the particular objection raised, the fact that this hearing is held at a considerable distance from Washington and has been prearranged a considerable time.

Mr. Laing: Well, may we assume then, Mr. Examiner, that the objections are overruled? [1223]

Mr. Laing: Mr. Lawlor, will you take the stand, please?

RALPH W. LAWLOR,

called as a witness on behalf of the Northwestern Electric Company, being first duly sworn, testified as follows:

(Testimony of Ralph W. Lawlor.)

Direct Examination

By Mr. Laing:

Q. Mr. Lawlor, will you give your full name and residence, please?

A. Ralph W. Lawlor, 105 Southwest Hamilton Street, Portland, Oregon.

Q. By whom are you employed, Mr. Lawlor?

A. Northwestern Electric Company.

Q. In what capacity?

A. Assistant secretary and assistant treasurer.

Q. And how long have you been assistant treasurer of the company?

A. I was elected assistant treasurer in March of 1938.

Q. Held that position continuously since?

A. I have.

Q. And your position as assistant treasurer places you in general familiarity and charge of the accounts, does it? A. Yes, it does.

Q. I hand you a statement which has been marked for [1225] identification as Exhibit No. 79 and ask you what that statement purports to show?

A. It is a statement of net income available for preferred stock dividend requirements and balance available for common stock for the years 1921 to 1940, inclusive.

Q. And the first column showing the years, the second column showing the net income available for dividends on the capital stock, is that correct?

(Testimony of Ralph W. Lawlor.)

A. That is correct.

Q. The third column showing the amount required to take care of the preferred stock dividend requirements? A. That is correct.

Q. And the final column showing the balance that would be available for dividends on the common stock? A. That is correct.

Q. In three of those years, notably '32, '33 and '34, it shows that there was a deficit insofar as the amount of earnings available for taking care of the preferred stock dividends, does it not?

A. You say preferred stock or common stock?

Q. Well, there weren't enough to pay the full amount of the preferred stock dividends. That is the amount shown in red in the fourth column?

A. That is right.

Q. Are these figures that are shown on this Exhibit [1226] No. 79 for identification correctly transcribed from the books and records of the company? A. They are.

Mr. Laing: I wish to offer that in evidence Mr. Examiner.

The Trial Examiner: Any objection?

Mr. Slaff: I should like to inquire at this time as to the purpose of the offer.

Mr. Laing: I have no objection to answering that question. The purpose of the offer is to show the values from the standpoint of the company's earnings that were accruing to the common stock during the period from 1921 to 1940, both inclusive.

(Testimony of Ralph W. Lawlor.)

Mr. Staff: Well, I shall object to it if it is offered for the purpose stated by counsel. Are you presuming now, Mr. Laing, if I may inquire a bit further, to use this as a predicate for a determination of value of the common stock? Is that the general purpose?

Mr. Laing: I am offering this as substantial evidence that there was a value measured by the earnings of the company accruing to the common stock and now accruing to the common stock as indicated by this exhibit.

Mr. Staff: Well, for that purpose I shall object to this exhibit coming into evidence.

The Trial Examiner: May I ask if this covers a period [1227] subsequent or prior to the payment of this three and a half million dollars?

Mr. Laing: Well, I don't know what is meant by the payment of three and a half million dollars.

The Trial Examiner: The issuance of the stock, I mean.

Mr. Laing: The stock, Mr. Examiner, was issued in 1912 and was finally declared to be paid up in 1914 or 1915 if I am correct as to the year. It constituted 100,000 shares of the then par value of $100 each. In 1926 by appropriate action of the stockholders and of the owners of the common stock at that time the par value was reduced from $100 to $25 a share.

The Trial Examiner: Well, I am obliged to rule under the circumstances that if this is testimony of

(Testimony of Ralph W. Lawlor.)

the value of the stock through dividends, or through money available for dividends, subsequent to the date of the issuance of the stock, that it is not admissible as evidence of value.

Mr. Laing: The problem that we have before us as I see it on this rehearing is the question of whether or not the amount of three and a half million dollars or any part of it that ultimately gets into Account No. 107 should be written off the books. The position of the Company is that that should not be written off the books because there is value in the assets of the company which justifies the retention of that three and a half million dollars, the entire amount of it, in the assets statement of the company. And this evidence is offered to [1228] show or to support our contention that there is a value represented by that three and a half million dollars as indicated in this particular exhibit by the showing of earnings available to the common stock, and the more nearly up-to-date that evidence is the more appropriate and more relevant it is to the position that we take.

Mr. Barber: It is further offered by the American Power & Light Co. to show value in the common stock, not only at the present time, but at a time prior to its acquisition, and as of the time of acquisition.

Mr. Slaff: And on that ground, too, we object, for that purpose, too, because here, as I have said

(Testimony of Ralph W. Lawlor.)

this morning, is a situation where there has been a determination by the Commission as far as this proceeding is concerned that the three and a half million dollars is a write-up, is an inflationary amount in the balance sheet, in so many words. And from that point on we must proceed in the determination of how that amount shall be disposed of.

Mr. Laing: Well, I have already indicated my position in respect to the matter of disposing of the three and a half million. Our position is one of indisposition to disposing of it in the way of writing it off.

The Trial Examiner: The Commission understands your position in this respect. I would say that this is inadmissible for the purpose you referred to; from the stand- [1229] point of the holding company there might be some question there.

Mr. Laing: May I point out further, Mr. Examiner, that perhaps you, not having been in this case, may not be fully familiar with the history of this stock. As I think I said, the common as originally issued, was 100,000 shares of the par value of $100 and was acquired as such by the American Power & Light Company in 1925. In 1936 as a result of certain proceedings and agreement with the American Power & Light Company and action by the stockholders of the company, the par value was reduced and the 100,000 shares of $100 stock were surrendered and there was issued

(Testimony of Ralph W. Lawlor.)

in place of that a total of 100,000 shares of fully-paid non-assessable common stock with the par value of $35 per share, so that the present stock was issued in that sense in 1936.

And of course our position with reference to the offer of this testimony, and of other testimony which we shall have to offer, is that there is and has been a definite value accruing to that common stock which is of such nature and amount as to preclude the idea of its being written off in any plan of disposition that may be suggested.

The Trial Examiner: In other words, you take your position on that simply as a basis of value of the common stock?

Mr. Laing: That is right, value accruing to the common stock. [1230]

The Trial Examiner: During a period from 1921 to 1940?

Mr. Laing: I am more particularly concerned from that standpoint with the last five years because they are a nearer measure of the value of the assets at the present time than earnings back twenty years ago.

Mr. Slaff: What the Company is proposing to do, then, as I understand their position, is to support an item which for the purposes of this proceeding must be taken to be an inflationary item on their balance sheet by a showing of value of a sort acquired after the original inflation. Now, from the point of view either of the system of ac-

(Testimony of Ralph W. Lawlor.)

counts prescribed by the Commission or any other sound principles of accounting, that just has no place in this proceeding or in any similar proceeding.

I object to it, as I say, not only on the ground that the company is precluded by the system of accounts and by the Commission itself from going into this type of testimony, but precluded as well by all sound accounting principles from attempting to support what is patently an inflationary item—what has been decided to be an inflationary item—by evidence of subsequent value of one sort or another.

The Trial Examiner: Well, I can find nothing to support this or make it admissible in evidence for the purpose originally stated. I will be glad to hear further from counsel for the American as to the part of it prior to the time of their purchase of the stock. [1231]

Mr. Priest: If the Examiner please, as my associate, Mr. Barber, has suggested this offer is made also on behalf of the American Power & Light Company with the thought and for the purpose of showing that as evidenced by the earnings of Northwestern Electric Company in the period from 1921 to 1925, the stock having been acquired by American Power & Light Company in 1925, that as evidenced by such earnings in that period from 1921 to 1925, the common stock of the Northwestern Company had substantial value, when it was

(Testimony of Ralph W. Lawlor.)

acquired in an arm's-length, open-market transaction by American Power & Light Company, and this is only one of the several criteria of value upon which American Power & Light Company obviously was entitled to rely when it purchased the stock of the Northwestern Electric Company in 1925.

The disposition order will have the effect—that is if the same disposition is ultimately insisted upon by the Commission as is contained in Paragraph 2(a) of the Order of December 6, 1940, if said amount of three million five, is ultimately transferred to Account 107, such a disposition would have the effect of depriving the American Power & Light Company of the substantial value which it believes inhered in 1925, and now inheres in the common stock of the Northwestern Electric Company, and will have the effect of depriving it of its property without due process of law. [1232]

As I said this morning in objecting to this proceeding, I objected to any further proceeding in this matter on behalf of the American Power & Light Company. The Commission found in its opinion of December 6, 1940, which accompanied its order of that date, that a disposition of said amount of three million five is the equivalent of ultimately obtaining from the holders of the common stock, that is American Power & Light Company, my client, a consideration of $3,500,000 for the stock.

Now, that is the stock, if your Honor please,

(Testimony of Ralph W. Lawlor.)

which we will show subsequently and that is I think already in the record—that is the stock for which the American Power & Light Company paid $5,000,000, approximately—it was slightly more than that—in 1925. And this offer is by way of disclosing to you, sir, as the Examiner, and to the Commission, one of the several criteria of value inherent in that stock at the time the American Power & Light Company acquired it.

Mr. Slaff: There is no dispute, Mr. Examiner, over the fact that the American Power & Light thought that there was value in this stock in 1925, or that, forsooth, to American Power & Light, the stock which it bought, had a value, and since the company paid some $5,000,000 for it at that time, presumably as far as it was concerned, it had that value to it at that time.

But we must not forget that there has been no value received by Northwestern Electric Company from American Power & [1233] Light Company for this stock or from anyone else for this stock as the Commission has determined. Consequently it is utterly irrelevant to this proceeding as to what American Power & Light may in 1925 have based its determination that at that time the stock was worth $5,000,000 to it. That has nothing whatever to do with the purpose of this hearing, with the basis of having any rehearing for the purpose that this rehearing has been set for.

Mr. Priest: Of course, Mr. Examiner, if coun-

(Testimony of Ralph W. Lawlor.)

sel will forgive me for making one more observation, of course Northwestern Electric Company contended in the original hearing in this matter and still contends and will urge when the petition for review of the Commission's order of December 6, 1940, is heard in the United States Circuit Court of Appeals, that the common stock was originally issued for value and that a substantial consideration was received therefor.

I don't question counsel's statement that the Commission has found to the contrary. I merely wanted to call to your Honor's attention the fact that that contention has not been and is not accepted by the Northwestern Electric and that that is one of the considerations which will be raised upon the review of the Commission's order of December 6, 1940, which is to be had in the Circuit Court of Appeals.

Mr. Slaff: Surely, but as far as this proceeding is concerned, Mr. Examiner, it has been determined that no considera- [1234] tion was ever received by Northwestern Electric for that stock.

The Trial Examiner: Well, I was going to ask counsel for the Northwestern Electric if they had any idea at this time of offering to produce any further evidence of consideration at that time.

Mr. Laing: You are asking, Mr. Examiner, whether the Company has any expectation of offering further evidence of consideration received by the Northwestern Electric Company from the issues of this stock?

(Testimony of Ralph W. Lawlor.)

The Trial Examiner: Yes.

Mr. Laing: We have no further evidence of that kind to offer. That was gone into by Mr. Platt as a witness in the other case and of course his testimony will be pertinent to whatever consideration the matter receives now.

The Trial Examiner: There was some question of the best evidence raised at that time.

Mr. Laing: Well, perhaps Mr. Slaff will remember. I don't recall objection being raised.

The Trial Examiner: Well, the fact that certain witnesses were not called who were living at the time.

Mr. Laing: Well, I don't recall that, myself. Maybe it was commented on in the opinion but I don't recall it during the hearing.

The Trial Examiner: I am forced to rule that this ex- [1235] hibit is not admissible for the purpose stated.

Mr. Laing: Very well, then, we will just pass to the next exhibit then. Of course it—I'd like to offer it in evidence and have it rejected and have the reporter retain the copy of the exhibit for whatever further discussion we may have on the subject.

(Northwestern Electric Company's Exhibit No. 79 rejected.)

(Testimony of Ralph W. Lawlor.)

EXHIBIT No. 79
(Rejected)

NORTHWESTERN ELECTRIC COMPANY

Statement of Net Income Available for Preferred Stock Dividend Requirements and Balance Available for Common Stock, Years 1921 to 1940 Inclusive.

Year	Net Income Available for Dividends (After Retirement Depreciation)	Amount Required for Preferred Stock Dividends	Balance Available for Common Stock Dividends
1921	243,412	116,034	127,378
1922	319,953	163,012	156,941
1923	363,393	206,388	157,005
1924	394,439	241,380	153,059
1925	429,924	317,790	112,134
1926	489,724	334,236	155,488
1927	632,426	335,773	296,653
1928	581,776	336,264	245,512
1929	561,520	336,326	225,194
1930	528,862	336,241	192,621
1931	559,838	335,735	224,103
1932	264,537	334,206	*69,669
1933	32,341	334,159	*301,818
1934	155,012	334,159	*179,147
1935	345,617	334,181	11,436
1936	542,738	338,186	204,552
1937	608,318	334,107	274,211
1938	461,580	334,182	127,398
1939	623,830	333,909	289,921
1940	460,051	334,200	125,851

Note: 7% preferred stock dividends for the period October 1, 1932 to December 31, 1935, and 6% preferred stock dividends for the period October 1, 1932 to December 31, 1938 are shown on accrual basis computed on the number of shares of stock outstanding at the end of each year.

(*Printer's Note: Asterisk denotes figures inserted on original copy of Exhibit 79.)

(Testimony of Ralph W. Lawlor.)

Mr. Laing: I'd like to have this next one marked for identification as Exhibit No. 80.

(Northwestern Electric Company's Exhibit No. 80 marked for identification.)

EXHIBIT No. 80

(Rejected)

NORTHWESTERN EEECTRIC COMPANY

Statement of Income and Earned Surplus
For the Twelve Months Ended December 31, 1940

Income	1940
Operating Revenues	$ 4,541,417.65
Operating Revenue Deductions:	
Operating expenses, including taxes	3,040,471.53
Amortization of limited-term investments	23.50
Property retirement reserve appropriations	325,000.00
Total operating revenue deductions	3,365,495.03
Net Operating Revenues	1,175,922.62
Rent for Lease of Plant	221,301.80
Operating Income	954,620.82
Other Income	1,137.17
Gross Income	955,757.99
Interest on Mortgage Bonds	299,835.16
Interest on Debentures	125,037.50
Other Interest and Deductions	71,222.19
Total	496,094.85
Less Interest Charged to Construction	387.94
Net interest and other deductions	495,706.91
Net Income	$ 460,051.08

(Testimony of Ralph W. Lawlor.)

Summary of Earned Surplus

Earned Surplus, January 1, 1940		$ 1,070,930.99
Add Miscellaneous Credits		176.50
Total		1,071,107.49
Deduct Loss on Sale of Non-operating Land		23,974.25
Balance		1,047,133.24
Add Net Income for the Twelve Months Ended December 31, 1940		460,051.08
Total		1,507,184.32
Deduct:		
Dividends on first preferred stock (7%)	330,862.00	
Dividends on preferred stock (6%)	3,337.50	
Total		334,199.50
Earned Surplus, December 31, 1940 (including amount restricted as to common dividends)		$ 1,172,984.82

Mr. Laing: This document which has been marked, Mr. Lawlor, as Exhibit No. 80 for identification, consisting of two sheets, what is that exhibit made up of?

A. It is a statement of income and earned surplus for the 12 months ended December 31, 1940, last.

Q. Last? That is the first sheet of the exhibit, is it?

A. That is the first sheet of the exhibit.

Q. And the second sheet is what?

(Testimony of Ralph W. Lawler.)

A. The second sheet is a balance sheet as of December 31, 1940, stating the assets and liabilities of the Northwestern Electric Company.

Q. And were these figures and this information shown on these two sheets correctly transcribed from the books of the [1236] company?

A. Yes, they are.

Mr. Laing: I wish to offer next No. 80 for identification in evidence, Mr. Examiner, the sheet No. 1 of that exhibit being offered for the same purpose as we offered the statement of earnings for the 20-year period, in Exhibit No. 79.

The Trial Examiner: Do I understand counsel to say that he only offered this for identification?

Mr. Laing: No, I was trying to give the label of the exhibit. I offer the exhibit which has been identified as Exhibit No. 80 for identification, in evidence for the same purpose as I offered in evidence Exhibit No. 79 for identification.

Mr. Slaff: I have the same objection, Mr. Examiner, to the purpose for which this is offered.

Mr. Priest: It is offered also for the same purpose on behalf of the American Power & Light Company.

The Trial Examiner: Offered for the same purpose on behalf of American Power & Light Company?

Mr. Laing: I may say, Mr. Examiner, in that connection that the second sheet of that exhibit probably counsel would not wish to object to. I

(Testimony of Ralph W. Lawlor.)

think in response to request of counsel in the former hearing we put in the balance sheets for the years ending 1938 and 1939. In any event, the balance sheet statements are simply transcripts of the company's [1237] books so that I assume counsel objects only to our offer of the first sheet of No. 80.

Mr. Slaff: That is correct, Mr. Laing.

Mr. Laing: So that we may assume, then, Mr. Examiner—have you ruled that the first sheet of this will not be admitted?

The Trial Examiner: Well, of course this offer is one exhibit. It is rather hard to rule on the admission of one sheet of an exhibit.

Mr. Laing: I think perhaps we had better separate them and make the first page—I now offer, Mr. Examiner, what was the first page of Exhibit 80 for identification and is now marked as Exhibit No. 80 for identification in evidence for the purpose of showing value accruing to the common stock based on the net earnings of the company available for common on the same basis as I offered the statement that was presented as Exhibit No. 79 for identification.

Mr. Priest: Mr. Examiner, the same offer is made on behalf of American Power & Light Company for the purpose previously stated with respect to the twenty-year earning statement.

The Trial Examiner: I presume the same objection?

Mr. Slaff: Same objection, yes.

(Testimony of Ralph W. Lawlor.)

The Trial Examiner: It will be rejected as was the other, for the same reason. [1238]

Mr. Laing: I now offer—I will have this second page marked as Exhibit No. 81 for identification, which is the balance sheet as of December 31, 1940, and that is offered for the general information of all concerned. I mean, there is no special contention made here that this in itself is any particular evidence or proof of value, but it does present an up-to-date statement of the assets and liabilities of the company.

The Trial Examiner: Any objection?

Mr. Slaff: In the light of that statement of counsel I have no objection to Exhibit 81.

The Trial Examiner: For the purpose stated by counsel Exhibit 81 is admitted.

(Northwestern Electric Company's Exhibit No. 81 received in evidence.)

(Testimony of Ralph W. Lawlor.)

EXHIBIT NO. 81

NORTHWESTERN ELECTRIC COMPANY
(Incorporated in Washington)
Balance Sheet, December 31, 1940

ASSETS

Plant, Property, and Equipment (including intangibles) —Ledger value		21,467,104.36
Investments		7,146.86
Current and Accrued Assets:		
Cash in banks—On demand	880,151.79	
Working funds	6,748.87	
Notes receivables	2,190.26	
Miscellaneous Special Deposits	3,776.60	
Accounts receivable:		
Customers and miscellaneous	406,536.63	
Portland Gas & Coke Company	6,285.19	
Washington Water Power Company	6,233.75	
Materials and supplies	203,881.31	
Prepayments	17,594.81	
Other current and accrued assets	745.54	
Total current and accrued assets		1,534,144.75
Deferred Debits:		
Unamortized debt expense	81,928.06	
Other	35,442.79	
Total deferred debits		117,370.85
Reacquired Capital Stock—326 shares first preferred (7%)		32,600.00
Contingent Assets (contra)		4,360.68
Total		$23,162,727.50

(Testimony of Ralph W. Lawlor.)

LIABILITIES		
Capital Stock:		
First preferred (7%), cumulative, $100 par, preference over preferred (6%), cumulative, and common stocks as to dividends and in liquidation; authorized, 100,000 shares; issued, 47,593	4,759,300.00	
Preferred (6%), cumulative, $100 par; preference over common stock as to dividends and in liquidation; authorized 20,000 shares; outstanding, 555 shares	55,500.00	
Common, $35 par, authorized and outstanding, 100,000 shares	3,500,000.00	
Total capital stock		8,314,800.00
Long-Term Debt:		
First mortgage bonds 4% series, due 1969	6,700,000.00	
4½% debentures, due 1959	2,660,000.00	
Total long-term debt		9,360,000.00
Current and Accrued Liabilities:		
Accounts payable:		
Inland Power & Light Company	60,031.57	
Pacific Power & Light Company	14,236.28	
Other	134,505.70	
Dividends declared	83,549.75	
Customers' deposits	53,045.00	
Taxes accrued	624,965.85	
Interest accrued	129,233.33	

(Testimony of Ralph W. Lawlor.)

Other current and accrued liabilities	3,355.62	
Total current and accrued liabilities		1,102,863.10
Deferred Credits:		
Revenues collected in advance	108,194.88	
Other	205.81	
Total deferred credits		108,400.69
Reserves:		
Property retirement	3,003,627.63	
Uncollectible accounts	37,441.58	
Inventory adjustment	27,174.92	
Injuries and damages	22,694.77	
Other	93.41	
Total reserves		3,091,032.31
Contributions in Aid of Construction		8,285.90
Contingent Liabilities (contra)		4,360.68
Earned Surplus (including amount restricted as to common dividends)		1,172,984.82
Total		$23,162,727.50

Mr. Laing: Will you mark this for identification as Exhibit No. 82?

(Northwestern Electric Company's Exhibit No. 82 marked for identification.)

By Mr. Laing:

Q. Mr. Lawlor, you have before you a document marked as Exhibit No. 82 for identification. I will ask you to tell us what that document is?

(Testimony of Ralph W. Lawlor.)

A. This is a certification of a special meeting of stockholders, Northwestern Electric Company, held September 16, [1239] 1936, and is a copy of the minutes reflecting the special meeting.

Q. In other words, that is a certified copy certified by C. W. Platt of the Company, is it not?

A. That is right.

Q. As secretary of the company, of the minutes, the official minutes of the meeting of the stockholders of Northwestern Electric Company held September 16, 1936?

A. That is right.

Q. At which meeting action was taken by the stockholders providing for reduction of the common stock from the par value of $100 per share to $35 per share?

A. That is correct.

Q. As more fully set forth in the minutes and resolutions so certified?

A. That is right.

Mr. Laing: I offer that in evidence, Mr. Examiner.

Mr. Shaff: I don't think it is particularly relevant, but I don't have any objections to it, Mr. Examiner.

The Trial Examiner: This is not stated to be for any particular purpose but for general information, as I understand it. Is that correct?

Mr. Laing: For all purposes of the record.

The Trial Examiner: For all purpose of the

(Testimony of Ralph W. Lawlor.)

record. If there is no objection it will be received. [1240]

(Northwestern Electric Company's Exhibit No. 82 received in evidence.)

EXHIBIT NO. 82

CERTIFICATE
NORTHWESTERN ELECTRIC COMPANY

State of Oregon
County of Multnomah—ss.

I, C. W. Platt, the duly elected, qualified and acting secretary of Northwestern Electric Company, a corporation organized and existing under the laws of the State of Washington, do hereby certify that the attached "Northwestern Electric Company, Special Meeting of Stockholders, September 16, 1936" is a full, true and correct copy of the minutes of a special meeting of the stockholders of Northwestern Electric Company duly held on the 16th day of September, 1936.

In Witness Whereof, I have hereunto affixed my signature and impressed the corporate seal of Northwestern Electric Company, at Portland, Oregon, this 1st day of August, 1940.

[Seal] C. W. PLATT
Secretary

(Testimony of Ralph W. Lawler.)

Exhibit No. 82—(Continued)

Northwestern Electric Company
Special Meeting of Stockholders
September 16, 1936

A special meeting of the stockholders of Northwestern Electric Company was duly held in the Memorial Building, 206 E. 13th Street, Vancouver, Washington, on Wednesday, September 16, 1936, at 11:00 o'clock in the forenoon, pursuant to resolution of the board of directors of the company adopted August 20, 1936, calling such meeting at the time and place above stated.

L. F. Merwin, president of the company, acted as chairman of the meeting, and C. W. Platt, secretary, acted as its secretary.

A copy of the notice of the meeting, with proof that same was duly given, was read and was ordered spread in full upon the minutes of the meeting. The following is a true copy of such notice and proof of mailing:

Notice of Special Meeting of Stockholders

To the Stockholders of Northwestern Electric Company:

Notice is hereby given that the Board of Directors of Northwestern Electric Company has called a special meeting of the stockholders of said corporation to be held in the Memorial Building, 206

(Testimony of Ralph W. Lawlor.)

Exhibit No. 82—(Continued)

E. 13th Street, Vancouver, Washington, on Wednesday, September 16, 1936, at 11:00 o'clock a.m., for the purpose of considering and acting upon the following proposed resolution, namely:

> Resolved, that the authorized capital stock of Northwestern Electric Company is hereby reduced from $22,000,000.00 to $15,500,000.00, by reducing the par value of the authorized and outstanding 100,000 shares of the common stock from $100.00 to $35.00 per share; that the acceptance of the written offer of American Power & Light Company, as owner of said outstanding 100,000 shares of common stock, to cooperate with Northwestern Electric Company in effecting such reduction in the par value of said shares, and to surrender the certificates heretofore outstanding evidencing said 100,000 shares of common stock in exchange for certificates duly issued by Northwestern Electric Company, evidencing the same number of shares of fully paid and non-assessable common stock of such reduced par value, is hereby approved and confirmed; that the issuance of certificates evidencing said 100,000 shares of fully paid and non-assessable common stock of the par value of $35.00 per share in exchange for, and upon the surrender and

(Testimony of Ralph W. Lawlor.)

Exhibit No. 82—(Continued)

cancellation of, the certificates now outstanding evidencing the 100,000 shares of the common stock of Northwestern Electric Company, is hereby authorized and approved; and that the directors and the officers of Northwestern Electric Company are hereby authorized forthwith to do any and all such acts and things in said company's name and behalf in furtherance of the foregoing as in the judgment of the directors or officers may appear necessary or appropriate."

Any stockholder who is unable to attend the meeting in person may vote at the meeting by a representative or representatives designated by the stockholder in a written proxy delivered to the Company at or before the time when the meeting is convened. The persons named in the enclosed form of proxy will be pleased to vote and act at the meeting for all stockholders who sign such proxies and return them to the Company in advance of the meeting.

Dated September 4, 1936.

By Order of the Board of Directors.

C. W. PLATT,

Secretary.

(Testimony of Ralph W. Lawlor.)

Exhibit No. 82—(Continued)

(Proof of Mailing)

State of Oregon
County of Multnomah—ss.

C. W. Platt, being duly sworn, says:

I am secretary of Northwestern Electric Company, a corporation of the State of Washington. On the 5th day of September, 1936, I caused to be mailed to each holder of record of the First Preferred stock and Preferred stock, as shown by the books of the Transfer Agent for said stocks, and to each holder of record of the Common stock, as shown by the books of the company, a copy of the notice of a special meeting of the stockholders of said corporation to be held in the Memorial Building, 206 E. 13th Street, Vancouver, Washington, on Wednesday, the 16th day of September, 1936, at eleven o'clock in the forenoon. A copy of said notice is attached hereto. Said notices were deposited in a United States Post Office in the City of Portland, Oregon, enclosed in a post paid wrapper addressed to each such stockholder of said corporation at his last known post office address appearing on such books.

C. W. PLATT

(Testimony of Ralph W. Lawlor.)

Exhibit No. 82—(Continued)

Subscribed and sworn to before me this 15th day of September, 1936.

H. S. BURNSIDE

Notary Public for Oregon

My commission expires 3/6/40.

A certified list of the stockholders of the company was presented showing the names of the stockholders and the number of shares held by each. The secretary stated that it appeared from such certified list that there were outstanding at the date of this meeting 729 shares of the (Original) Preferred stock, 47,441 shares of the First Preferred stock, and 100,000 shares of the common stock, or a total of 148,170 shares of the capital stock of this company.

There were 63 stockholders present in person, representing 2649 shares of the capital stock of the company. Written proxies executed by the holders of 24,585 shares of preferred stock and 100,000 shares of common stock, or a total of 124,585 shares of the capital stock of the company, each constituting and appointing John A. Laing as the attorney and agent for the stockholder to vote and act at this meeting, were presented by said John A. Laing. The aforesaid proxies were examined by the secretary and found to be in proper form. They were marked for identification and ordered filed in the records of the company.

(Testimony of Ralph W. Lawlor.)

Exhibit No. 82—(Continued)

There were, therefore, present in person and by proxy the holders of 127,234 shares of the capital stock of the company, constituting more than two-thirds of the capital stock outstanding and a quorum for the transaction of the business of the meeting.

At the chairman's request, John A. Laing, vice-president of the company, presented and read a letter addressed to Northwestern Electric Company by American Power & Light Company dated August 18, 1936, of which the following is a true copy:

"American Power & Light Company
Two Rector Street
New York, N. Y.

At Portland, Oregon
August 18, 1936

Northwestern Electric Company
Portland, Oregon

Gentlemen:

There is now pending in the Superior Court of the State of Washington for Clark County Cause No. 11838, entitled "Elmer B. Allen, et al, Plaintiffs, v. Northwestern Electric Company, a corporation, and American Power & Light Company, a corporation, Defendants", wherein plaintiffs for

(Testimony of Ralph W. Lawlor.)

Exhibit No. 82—(Continued)

themselves and on behalf of all persons similarly situated attack the validity of the issuance of the 100,000 shares of common stock in your company now owned by and held in the name or on behalf of this company. The position of this company is that said suit is wholly without merit and that the American Power & Light Company is now, and at all times since its purchase in the open market of the authorized and outstanding 100,000 shares of common stock of your company has been, the owner of all of said common stock as fully paid and non-assessable stock, free from any lawful claim or demand of any kind or nature by you or by or in behalf of the plaintiffs in said action or the holders of preferred stock of your company as a class or by and on behalf of any other persons whomsoever.

We understand, however, that your company desires to take action looking to a substantial reduction in the par value of your common stock, for the reason that the present balance sheet liability of $10,000,000 in respect thereof is regarded by you as an obstacle to the payment of dividends upon your preferred stock, in view of certain provisions of the Uniform Business Corporation Act of the State of Washington.

Without in any way departing from or waiving in any particular our position or any of our rights

(Testimony of Ralph W. Lawlor.)

Exhibit No. 82—(Continued)

or claims in respect of said 100,000 shares of common stock of your company, and expressly denying the existence of any liability or obligation on our part to anyone with respect to said stock, but solely as a voluntary and gratuitous act for the accommodation and benefit of your company and the preferred stockholders thereof, we submit the following proposal, namely:

If

(1) You will take or cause to be taken corporate action in substance and form satisfactory to us lawfully to effect a reduction in the par value of your common stock from $100 per share to $35 per share and to authorize the issuance of certificates evidencing 100,000 shares of fully paid and non-assessable common stock of such reduced par value in exchange for the now outstanding certificates for the 100,000 shares of common stock owned by this company,

We will

(1) As the owner of the 100,000 shares of the common stock of your company heretofore authorized and now outstanding, cooperate in the taking of appropriate corporate action lawfully to effect such reduction in the par value of the common stock and to authorize the issuance of certificates for 100,000 shares of fully paid and non-assessable

(Testimony of Ralph W. Lawlor.)

Exhibit No. 82—(Continued)

common stock of such reduced par value in exchange for the now outstanding certificates for the 100,000 shares of common stock owned by this company; and

(2) Upon the consummation of such reduction and the due authorization of such exchange, surrender the certificates evidencing the outstanding 100,000 shares of common stock of your company in exchange for certificates evidencing the same number of shares of fully paid and non-assessable common stock of such reduced par value; and

(3) Reimburse you to an amount not exceeding $3500 for any costs or expenses incurred by you in connection with said action No. 14838.

However, in view of the claims asserted in said pending action, our proposal as above set forth is conditional upon the immediate execution by or on behalf of the plaintiffs in said cause No. 14838 of a stipulation to be filed in said cause under which plaintiffs will agree that, upon the consummation of the reduction in par value and exchange of certificates as above proposed, a final decree will be entered in said cause No. 14838 adjudging this company to be the owner of 100,000 shares of fully paid and non-assessable common capital stock of Northwestern Electric Company of the par value of $35 per share, quieting the title of this company to such

(Testimony of Ralph W. Lawlor.)

Exhibit No. 82—(Continued)

shares and dismissing said action with prejudice as to the plaintiffs therein, but without costs to any party.

Yours truly,
AMERICAN POWER & LIGHT COMPANY
By F. D. METZGER
Its Authorized Agent"

Mr. Laing reported that a stipulation had been entered into under date of August 18, 1936, and was now on file in the suit of Allen et al. v. Northwestern Electric Company and American Power & Light Company, in the Superior Court of the State of Washington in and for Clark County, providing among other things for the entry of a final decree in said suit dismissing the suit with prejudice, and without costs to any party, upon the consummation within sixty days from said August 18, 1936, of a reduction in the par value of the common stock of this company from $100.00 per share to $35.00 per share, and the surrender by American Power & Light Company of the certificates evidencing the 100,000 shares of said common stock of the par value of $100.00 per share in exchange for certificates evidencing 100,000 shares of the fully paid and non-assessable common stock of this company of the par value of $35.00 per share.

Mr. Laing also referred to the resolutions adopted

(Testimony of Ralph W. Lawlor.)

Exhibit No. 82—(Continued)

by the board of directors of this company at the regular meeting thereof held on August 20, 1936, relating to the proposed reduction of the par value of the 100,000 shares of common stock of the company from $100.00 per share to $35.00 per share, as fully set forth in the minutes of said meeting.

On motion, duly seconded, and after full discussion of the subject matter of the proposed resolution set forth in the notice of this meeting, said resolution was unanimously approved by the holders of all of the shares of the capital stock of the company present in person or by proxy at this meeting, the same being more than two-thirds of all the capital stock of the company issued and outstanding, and was declared duly adopted, namely:

> Resolved, that the authorized capital stock of Northwestern Electric Company is hereby reduced from $22,000,000.00 to $15,500,000.00, by reducing the par value of the authorized and outstanding 100,000 shares of the common stock from $100.00 to $35.00 per share; that the acceptance of the written offer of American Power & Light Company, as owner of said outstanding 100,000 shares of common stock, to cooperate with Northwestern Electric Company in effecting such reduction in the par value of said shares, and to surrender the certificates heretofore outstanding evidencing said

Exhibit No. 82—(Continued)

100,000 shares of common stock in exchange for certificates duly issued by Northwestern Electric Company evidencing the same number of shares of fully paid and non-assessable common stock of such reduced par value, is hereby approved and confirmed; that the issuance of certificates evidencing said 100,000 shares of fully paid and non-assessable common stock of the par value of $35.00 per share in exchange for, and upon the surrender and cancellation of, the certificates now outstanding evidencing the 100,000 shares of the common stock of Northwestern Electric Company, is hereby authorized and approved; and that the directors and the officers of Northwestern Electric Company are hereby authorized forthwith to do any and all such acts and things in said company's name and behalf in furtherance of the foregoing as in the judgment of the directors or officers may appear necessary or appropriate.

There being no further business, upon motion duly seconded and carried, the meeting adjourned.

(Corporate Seal) (Signed) C. W. PLATT
Secretary

Approved:
(Signed) L. F. MERWIN
Chairman

(Testimony of Ralph W. Lawlor.)

Mr. Priest: Mr. Examiner, may it be understood that these offers made in behalf of Northwestern Electric Company also are made in behalf of American Power & Light Company?

Mr. Laing: I'd like to have this document marked as Exhibit No. 83.

(Northwestern Electric Company's Exhibit No. 83 marked for identification.)

By Mr. Laing:

Q. Mr. Lawlor, the document which you now have before you which has been marked No. 83 for identification, what does that consist of?

A. It is a certification——

Q. (Interrupting) By "certification" you mean it is a certified copy, do you not?

A. Certified copy, yes, of the articles of reduction of capital stock of Northwestern Electric Company, accompanied by an official certificate from the Department of State of the State of Washington.

Q. Showing the filing of those articles of reduction in due form as required by the laws of the state of Washington?

A. That is correct.

Q. This certificate of reduction, articles of reduction [1241] of capital stock, was executed by the company under what date?

A. It was executed by the—see if I understand that question correctly. The certificate——

Q. ——Was executed by the Company under what date?

(Testimony of Ralph W. Lawlor.)

A. Under date of September 16, 1936.

Q. In other words, this certificate was executed immediately following and pursuant to the action taken by the stockholders meeting reflected in Exhibit No. 82?

A. That is right; yes, sir.

Mr. Laing: I'd like to offer that in evidence, Mr. Examiner.

The Trial Examiner: Any objections, counsel?

Mr. Shaff: I don't think so, Mr. Examiner. I haven't had much of an opportunity to examine this but I don't think there is any objection. There seems to be one or two self-serving statements, but they don't have any probative value.

The Trial Examiner: The exhibit is admitted.

(Northwestern Electric Company's Exhibit No. 83 received in evidence.) [1242]

EXHIBIT No. 83

NORTHWESTERN ELECTRIC COMPANY

State of Oregon
County of Multnomah—ss.

I, R. W. Lawlor, do hereby certify that I am the duly elected, qualified and acting Assistant Secretary of Northwestern Electric Company, a corporation of the State of Washington; that attached hereto is a full and true copy of the Articles of Reduction of Capital Stock of Northwestern Elec-

(Testimony of Ralph W. Lawlor.)

tric Company, and the official certificate of filing thereof, as filed by said corporation in the office of the Secretary of the State of Washington on the 16th day of September, 1936, as made by me or under my supervision from a copy of said document officially certified by said Secretary of State.

In Witness Whereof I have hereunto affixed my official signature and the corporate seal of said Northwestern Electric Company this 1st day of March, 1941.

[Seal] R. W. LAWLOR,
Assistant Secretary.

NORTHWESTERN ELECTRIC COMPANY ARTICLES OF REDUCTION OF CAPITAL STOCK

Know All Men by These Presents, that Northwestern Electric Company, a corporation organized under the laws of the State of Washington, and having its principal office in the City of Vancouver, in Clark County in said state, has reduced the amount of the authorized capital stock of said corporation from Twenty Two Million Dollars ($22,000,000.00) to Fifteen Million Five Hundred Thousand Dollars ($15,500,000.00), by reducing the par value of the authorized and outstanding 100,000 shares of the common stock from One Hundred Dollars ($100.00) to Thirty-five Dollars ($35.00) per share;

(Testimony of Ralph W. Lawlor.)

That said reduction of the capital stock has been effected by and pursuant to a resolution which was duly adopted by the affirmative votes of the holders of more than two-thirds of all the issued and outstanding shares of the capital stock of the corporation, including the unanimous vote of the owners and holders of the entire 100,000 shares of common stock, at a meeting of the shareholders of said corporation duly called and held for the purpose at its said principal office on the 16th day of September, 1936, a true copy of which resolution is as follows:

> Resolved, that the authorized capital stock of Northwestern Electric Company is hereby reduced from $22,000,000.00 to $15,500,000.00, by reducing the par value of the authorized and outstanding 100,000 shares of the common stock from $100.00 to $35.00 per share; that the acceptance of the written offer of American Power & Light Company, as owner of said outstanding 100,000 shares of common stock, to cooperate with Northwestern Electric Company in effecting such reduction in the par value of said shares, and to surrender the certificate heretofore outstanding evidencing said 100,000 shares of common stock in exchange for certificates duly issued by Northwestern Electric Company evidencing the same number of shares of fully paid and non-assessable common stock of such reduced par value, is hereby approved

(Testimony of Ralph W. Lawlor.)

and confirmed; that the issuance of certificates evidencing said 100,000 shares of fully paid and non-assessable common stock of the par value of $35.00 per share in exchange for, and upon the surrender and cancellation of, the certificates now outstanding evidencing the 100,000 shares of the common stock of Northwestern Electric Company, is hereby authorized and approved; and that the directors and the officers of Northwestern Electric Company are hereby authorized forthwith to do any and all such acts and things in said company's name and behalf in furtherance of the foregoing as in the judgment of the directors or officers may appear necessary or appropriate.

That the certificates evidencing the 100,000 shares of the common stock of Northwestern Electric Company heretofore issued and outstanding have been surrendered to said corporation by the record holders thereof in exchange for certificates issued by Northwestern Electric Company evidencing 100,000 shares of its fully paid and non-assessable common stock of the par value of $35.00 per share; that such $6,500,000 reduction in the par value of said 100,000 shares of common stock has been applied to reduce the book value of the assets of the corporation in the same amount; that none of the assets or property of the corporation has been or will be distributed or paid out to stockholders or otherwise impaired as an incident of or in connection with said reduction of the capital stock; and that such reduc-

(Testimony of Ralph W. Lawlor.)

tion of the capital stock has not reduced and will not reduce the fair value of the assets of the corporation to an amount less than the total amount of its debts and liabilities plus the amount of its capital stock as so reduced.

A condensed statement of the assets and liabilities of the corporation as of August 31, 1936, adjusted to give effect to said reduction of the capital stock, is as follows:

ASSETS

Plant and Investments	$21,019,839.17
Current Assets	1,380,539.38
Miscellaneous Assets	51,243.38
Suspense Debit Items	67,925.14
Total	$22,519,547.07

LIABILITIES

Current Liabilities	$ 712,516.11
Miscellaneous Liabilities	20,401.63
Long Term Debt—Mortgage Bonds—Net	6,288,690.00
Long Term Debt—Loan Payable	2,819,609.51
Reserve Accounts	2,387,830.40
Capital Stock—Preferred	4,817,000.00
Common	3,500,000.00
Earned Surplus	1,973,589.42
Total	$22,519,547.07

Note: Undeclared cumulative dividends on preferred stock, not provided for in above statement, amounted to $1,267,406.55 on same date.

In Witness Whereof, said Northwestern Electric Company has caused these presents to be executed in triplicate original counterparts by its president

(Testimony of Ralph W. Lawlor.)

and its secretary, and its corporate seal to be hereunto affixed, this 16th day of September, 1936.

[Seal of Northwestern Electric Company]

NORTHWESTERN ELECTRIC COMPANY,

By L. T. MERWIN,

President,

By C. W. PLATT,

Secretary.

State of Oregon

County of Multnomah—ss.

We, L. T. Merwin and C. W. Platt, being first duly sworn, upon oath severally depose and say: that said L. T. Merwin is the duly elected and acting president, and that said C. W. Platt is the duly elected and acting secretary, of Northwestern Electric Company, the corporation named in and that executed the within and foregoing instrument; that the recitals and statements made and set forth in said instrument are true, to the best of our knowledge, information and belief; and that the seal affixed to said instrument is the corporate seal of said corporation.

L. T. MERWIN,

C. W. PLATT.

Subscribed and sworn to before me this 16th day of September, 1936.

H. N. BURNSIDE,

Notary Public for Oregon Residing at Portland, Oregon.

My commission expires March 6, 1940.

(Testimony of Ralph W. Lawlor.)

S. F. No. 1421—1936,6635
Article No. 83736 Domestic

DEPARTMENT OF STATE

OLYMPIA

Office of The
Secretary of State

I, Ernest N. Hutchinson, Secretary of State of the State of Washington, do hereby certify that Amended

ARTICLES OF INCORPORATION
of The
NORTHWESTERN ELECTRIC COMPANY

(Reducing capital to $15,500,000.00)

a Domestic Corporation, of Vancouver, Washington, were, on the 16th day of September, A. D., 1936, at 2:55 o'clock P. M., filed for record in this office and now remain on file herein, being duly recorded in Book 193, at Page 212-213, Domestic Corporations.

In Testimony Whereof, I have hereunto set my hand and affixed hereto the Seal of the State of Washington.

Done at the Capitol, at Olympia, this 12th day of November, A. D., 1936.

ERNEST H. HUTCHINSON,
Secretary of State.
By CHARLES B. REED,
Asst. Secretary of State.

(Testimony of Ralph W. Lawlor:)

Q. The document which you have before you, marked Exhibit No. 84, is what?

A. This is the form of stock certificate used by Northwestern Electric Company at the present time and was also used for the reissue of the common stock in 1936.

Q. This is the exact form, actually, a specimen of the stock certificate used for that purpose, is it not? A. Yes, it is.

Q. And has been so used by the Northwestern Electric Company since the change in the par value of its common stock in the summer of 1936?

A. That is correct.

Mr. Laing: I offer this as an exhibit, Mr. Examiner.

Mr. Slaff: I would like to object, because I do not see any necessity of cluttering up the record with these irrelevant documents. I don't know what relevancy this document would have.

Mr. Laing: It is relevant in this connection, Mr. Examiner: It shows the kind of stock certificates that the American Power & Light Company got by contract with the stockholders of the Northwestern Electric Company in 1936 and which they now hold.

Mr. Slaff: If it is offered for the purpose of putting into the record the statement that the American Power & Light Company is the owner of so many shares of fully paid and non- [1243] assessable shares of common stock of the par value of $25.00 per share of the Northwestern Electric Com-

(Testimony of Ralph W. Lawlor.)

pany. I have no doubt that the preceding stock certificate which the American held also had the statement that it was the owner of so many shares of fully paid and non-assessable shares of common stock of the par value of $100.00 per share. I don't see any materiality of evidence of this kind at all.

The Trial Examiner: I do not, except it may be admissible for the purpose of showing the relation between the American Power & Light Company and the Northwestern at the present time, that they are the owners of so many shares of stock.

Mr. Slaff: No question or dispute as to that.

Mr. Priest: I think we are entitled to show what the present contractual relationship is, at least.

The Trial Examiner: It is admissible for what it is worth. For that purpose Exhibit No. 84 is received. [1244]

EXHIBIT No. 84

Number Shares

Specimen

NORTHWESTERN ELECTRIC COMPANY

Authorized Capital Stock consists of 200,000 shares of Original Preferred stock and 100,000 shares of First Preferred stock, all of the par value of $100 per shares and 100,000 shares of Common stock of the par value of $35 per share. Each share of stock has full voting rights.

(Testimony of Ralph W. Lawlor.)

Incorporated Under the Laws of the State of Washington

This Certifies That .....

is the owner of ..... fully paid and non-assessable shares of Common stock of the par value of $35 per share of Northwestern Electric Company transferable on the books of the corporation in person or by duly authorized attorney upon surrender of this certificate, properly endorsed.

The First Preferred stock is entitled in preference to the Original Preferred and Common stocks to cumulative dividends at the rate of seven per centum per annum, and on liquidation or distribution of capital assets to the par value thereof and accumulated dividends. The Original Preferred stock is entitled in preference to the Common stock to cumulative dividends at the rate of six per centum per annum, and on liquidation or distribution of capital assets to the par value thereof and accumulated dividends. The Original Preferred stock may be converted into First Preferred stock at the rate of nine-tenths of a share of First Preferred stock for each share of Original Preferred stock.

Witness the seal of said corporation and the signatures of its duly authorized officers.

Dated .....

.....
Secretary.

.....
President.

(Testimony of Ralph W. Lawlor.)

Superimposed on the face of the certificate in large green letters is the word "Common". The back of the certificate reads as follows:

For Value Received, ... hereby sell, assign and transfer unto .....

..... Shares of the Common Stock represented by the within Certificate, and do hereby irrevocably constitute and appoint ..... Attorney to transfer the said Stock on the books of the within named Corporation with full power of substitution in the premises.

Dated 19

In presence of

.....

.....

Notice: the signature of this assignment must correspond with the name as written upon the face of the certificate, in every particular, without alteration or enlargement, or any change whatever.

Northwestern Electric Company. Certificate for ..... Shares of Common Stock. Issued to .....

Dated .....

Mr. Laing: I would like to call Mr. McCurrach.

DAVID F. McCURRACH

called as a witness on behalf of the Northwestern

(Testimony of David F. McCurrach.)

Electric Company, being first duly sworn, testified as follows:

Direct Examination

By Mr. Laing:

Q. Your name is David F. McCurrach?

A. Yes, sir.

Q. And I believe you have been previously sworn as a witness in this proceeding, have you not?

A. I have.

Q. For the purpose of quick identification you have been associated for a number of years with the Northwestern Electric Company as an engineering and analytical advisor, have you not?

A. Yes, sir.

The Trial Examiner: With regard to the suggestion that he was sworn at a previous hearing of which this is a rehearing, I wish you would clarify the record on that.

Mr. Laing: I might say he was called at the previous session.

The Trial Examiner: I understand but the record might [1245] not show that clearly.

Q. (By Mr. Laing): Mr. McCurrach, I hand you what has just been marked Exhibit No. 85 for identification. That purports to show what?

A. It shows the average price per kilowatt hour for residential customers, Northwestern Electric Company.

Q. For what period of time?

A. For the years 1922 to 1940 inclusive.

Q. As compared with what?

(Testimony of David F. McCurrach.)

A. As compared with the national average for the same period.

Q. Explaining that briefly, what does that show as of the end of the period to be the average price received by the Northwestern Electric Company for its residential services?

Mr. Slaff: I should like to object to that on the same ground on which I am going to object to the exhibit when offered, getting the subject and the exhibit into the record before it is offered. I am sure Mr. Laing has no intention of doing so, before there is a ruling on it.

Mr. Laing: That is all. I wanted to make the nature of the exhibit clear.

Mr. Slaff: Well, I think the nature of it has been explained and made clear. Now I take it we are going into the substance of the exhibit?

Mr. Laing: Yes. [1246]

Mr. Slaff: I should like to object to that, after the exhibit——

The Trial Examiner: I think the witness might state it was a comparison of two different things, but to state what it shows as a comparison would be out of place at this time until the exhibit is ruled on.

Mr. Slaff: The objection is sustained?

The Trial Examiner: Yes.

Mr. Laing: May I ask one more question, Mr. Examiner?

The Trial Examiner: Yes.

Q. (By Mr. Laing): Are the figures shown on

(Testimony of David F. McMurrach.)

Exhibit 85 for Identification a correct transcript of the records of the company with respect to the facts that they purport to show?

A. They are, sir.

Mr. Laing: I offer then Exhibit No. 85, in evidence.

Mr. Slaff: I object to it, Mr. Examiner, because it has no relevancy or materiality to this proceeding, whether the average price per kilowatt hour for Portland, for the Northwestern system is high or low as compared with the national average. That has nothing to do with the problem involved in this rehearing.

The Trial Examiner: The question of rates is not an issue in this case, and the Trial Examiner finds himself constrained to rule that the exhibit is not admissible.

Mr. Laing: May I explain, Mr. Examiner, not that I have [1247] any idea that it will change Your Honor's ruling on the subject, but my point is I think it indicates rather persuasively particularly in connection with the exhibit that we have offered as to the earning record of the Company, that this property is a successfully-operated property, that it is making earnings in substantial amounts available for its common stock and at exceedingly low rates from the customers' standpoint, which is an evidence of the character of the successful management of the concern, all of which has a bearing, in our opinion, as to the asset value that the Commission has suggested be written off.

Mr. Slaff: The character of the management of

(Testimony of David F. McCurrach.)

the Company or its operations is not in issue, as I understand, in this rehearing.

Mr. Laing: I am not so much concerned with the character of the management as I am with the fact that it is a successful, going concern, which has a bearing on the value of the common stock. I am glad to have counsel correct me as to the character of the management, because I am not interested in that only as a part of a successful, going concern.

The Trial Examiner: The Examiner fails to see fully where this is relevant to the issue, however. The price per kilowatt hour for residential consumers certainly does not show the value of any property at any time. [1248]

Mr. Laing: It shows, Mr. Examiner, merely one of the facts that here is a company that is selling electricity for about half of the national average cost for residential services and is making earnings in substantial amounts, which are accruing to its common stock, and those facts are essential and material in any consideration of writing off this proposed three and a half million dollars from Account 107, and it has a definite bearing on the value of this company as an established and successful going concern.

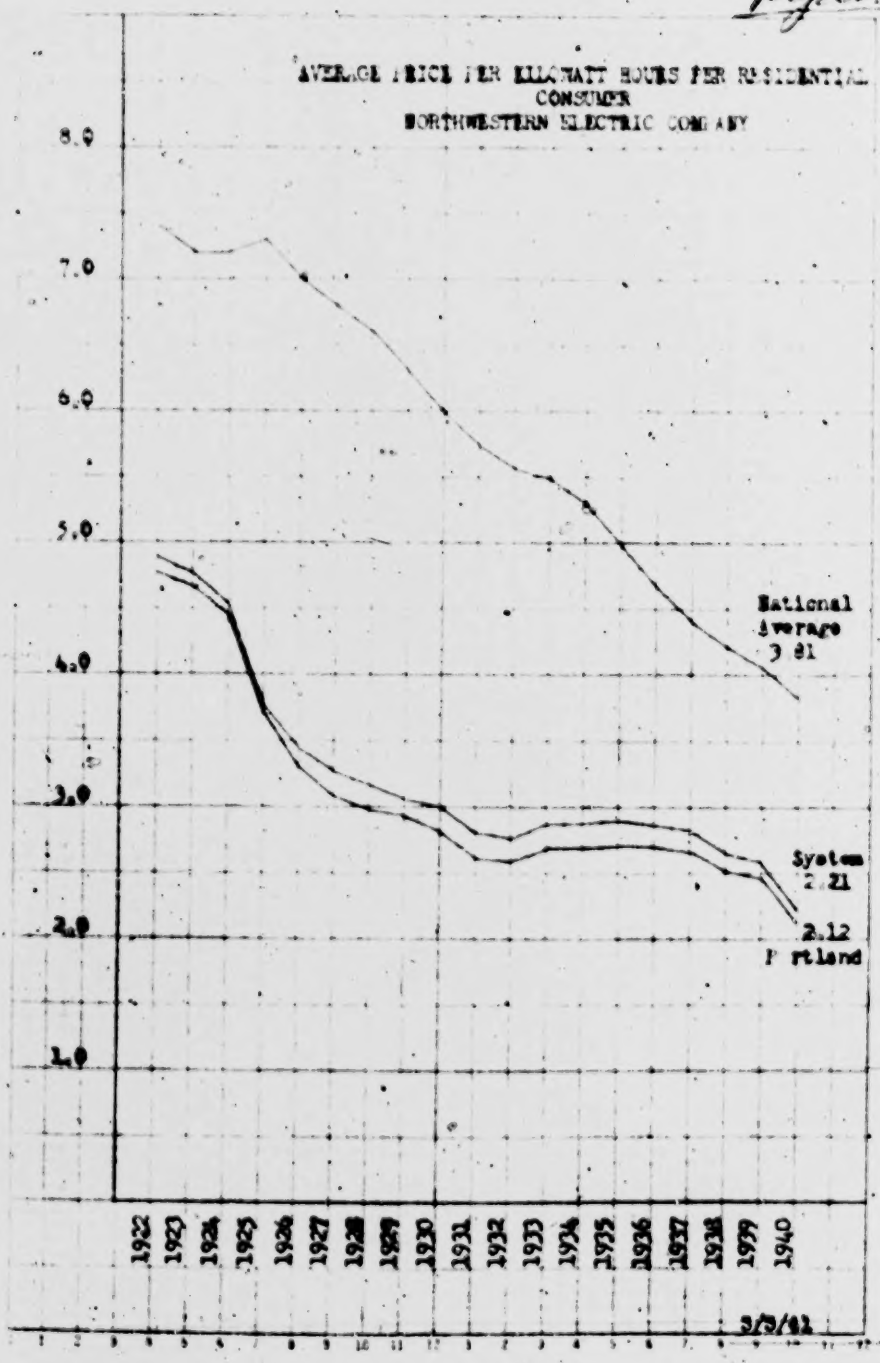
Mr. Slaff: I take it that The Examiner has ruled?

The Trial Examiner: The Examiner has ruled that it is not admissible for the purpose stated.

(Northwestern Electric Company's Exhibit

Exhibit 85

Rejected



(Testimony of David F. McCurrach.)

Q. (By Mr. Laing): Exhibit No. 86 for identification is what?

A. Exhibit No. 86 shows from 1922 to 1940 inclusive, the average kilowatt hours per year for residential customers of Northwestern Electric Company.

Q. By that you mean the average consumption per customer?

A. The average consumption per customer, yes, sir.

Q. Is that correctly transcribed from the books and records of the company? A. A. Yes. [1249]

Mr. Laing: I offer that Exhibit 86 for the same purposes that I offered No. 85.

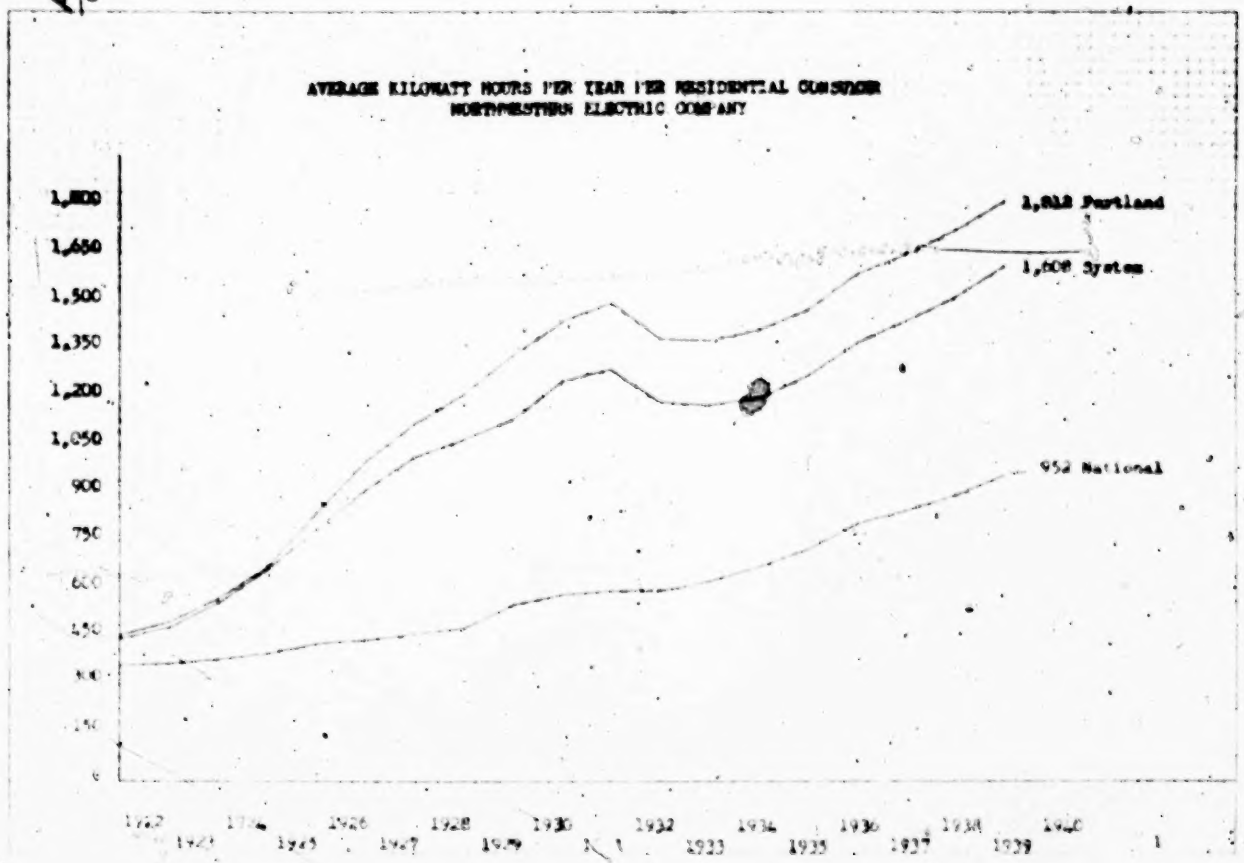
Mr. Slaff: I object to it because it is the same character of evidence.

The Trial Examiner: I see no distinction between the nature of the material offered here in Exhibit No. 86 and the Exhibit is refused for the same reason as Exhibit 85 was refused.

(Northwestern Electric Company's Exhibit No. 86 was refused.)

Exhibit 86

Exhibit 86



(Testimony of David F. McCurrach.)

Mr. Laing: Those are the only questions we have of Mr. McCurrach.

Mr. Slaff: No cross examination of Mr. McCurrach.

Mr. Priest: Mr. Examiner, does the record show,—I think it does, but I would like the record to show that these offers as made on behalf of the Northwestern Electric Company are also made on behalf of the American Power & Light Company. Is that understood?

The Trial Examiner: I believe that statement was made some time ago and is already in the record.

Mr. Priest: I think acquiescence was indicated by a nod of the head, and I don't know whether it got into the record or not.

Mr. Slaff: Well, that was my understanding, that all of these offers are on behalf of both companies. [1250]

Mr. Laing: Mr. Examiner, I would like to call Mr. E. C. Willard.

E. C. WILLARD

called as a witness on behalf of the Northwestern Electric Company, being first duly sworn, testified as follows:

Direct Examination

By Mr. Laing:

Q. Will you please state your name and place of residence?

(Testimony of E. C. Willard.)

A. Ernest C. Willard: I reside in Portland, Oregon, my office address being 619 Corbett Building in this city.

Q. What is your occupation or profession?

A. I am a Consulting Engineer.

Q. Are you a registered professional engineer?

A. Yes. I am registered as a qualified professional engineer in the States of Oregon, Washington and New York.

Q. With what professional engineering organizations have you been associated?

A. I am a member of the American Society of Civil Engineers and I am a past president of the Oregon Section of the American Society of Civil Engineers; I also was a charter member of the National Association of Cost Accountants.

Q. What, if any, public or quasi-public positions do you hold? [1251]

A. I am a member of the Board of Trustees of Pacific University, Forest Grove, Oregon; I am also a member of the Board of Managers of Oregone Institute of Technology and Multnomah College here in Portland; I am the past Chairman and a present member of the Sewer Charge Equalization Board of the City of Portland and a member of the City Planning Commission of the City of Portland.

Q. What have been your educational training and professional engineering experiences?

A. I attended Worcester Polytechnic Institute

(Testimony of E. C. Willard.)

in Worcester, Mass., and began my engineering work in 1906 when I became associated with Bailey and Calsson, Civil Engineers and Surveyors, Fitchburg, Massachusetts. My work for this firm consisted of general engineering and surveying, although the major portion was in connection with street railway construction. Later in 1906 I was with Smith and Brooks, Civil Engineers and Surveyors, Lowell, Massachusetts. For this firm, my work consisted of general engineering and surveying, but my principal work was in connection with the design and construction of water works for North Chelmsford, Massachusetts.

From April 1907 to July, 1907, I was with the Boston and Albany Railroad working on third track construction and general maintenance.

From July 1907 to September 1908, I was with the [1252] Metropolitan Park Commission, Boston, Massachusetts. Practically all of my work for this Commission was in charge of parties on surveying, road, bridge, seawall, dam and building construction and general river and park improvement, with about six months on design and computing.

From September 1908 to October 1910, I was with the Commissioners on Sewerage, Louisville, Kentucky, as draftsman, as Senior Inspector on construction, in charge of field parties upon location and construction work and later as Assistant in charge of Resident Engineer's Office, North-

(Testimony of E. C. Willard.)

western Division, having been in charge of field parties, preparation of estimates, etc.

From January 1911 to March 1911, I was Assistant Engineer with the Arnold Company, Chicago, Illinois, in connection with the valuation of the Seattle Electric Company, being in charge of work in connection with the power plant equipment.

From April 1911 to July 1912, I was Assistant Engineer with Halbert P. Gillette, Chicago, Illinois, and in that capacity worked on various valuations of Public Utilities properties. I was in charge of the valuation of Building, Power Plant Equipment, Steam Heat Distribution System and Rolling Stock of the Seattle Electric Company, Seattle, Washington. I was in charge of the valuation of the Everett Railway, Light and Water Company, Everett, Washington, [1253] including the Railway System, Light and Power System and Water System; and I also was in charge of the valuation of the Whatcom County Railway, Light and Power Company, Bellingham, Washington, including the Railway System, Light and Power System and Gas System.

From July 1912 to September 1912, I was retained by Fairhaven City, Water and Power Company, Bellingham, Washington, and the Raymond Light and Water Company, Raymond, Washington in connection with valuations and rate investigations.

(Testimony of E. C. Willard.)

From September 1912 to July 1913, I was Assistant Engineer with William J. Hagenah, in charge of the valuation of the Track and Roadway system of the Portland Railway, Light and Power Company, Portland, Oregon.

From July 1913 to July 1916, I was Assistant Engineer with Henry L. Gray, Seattle, Washington. During this time I was responsible, under Mr. Gray's direction, for valuations and rate investigations made of the following properties:

Tacoma Railway and Power Company, Tacoma, Washington.

Pacific Traction Company, Tacoma, Washington.

Puget Sound Electric Company, Tacoma, Washington.

Kootenai Power Company, Coeur D'Alene, Idaho.

Consumers Water Company, Coeur D'Alene, Idaho.

Washington Water Power Company, Spokane, Washington.

Sandpoint Light and Water Company, Sandpoint, Idaho.

Pacific Power and Light Company, Portland, Oregon. [1254]

Hydro-Electric Company, Hood River, Oregon.

Hood River Gas and Electric Company, Hood River, Oregon.

Anacortes Water Company, Anacortes, Washington.

(Testimony of E. C. Willard.)

Northwest Light and Water Company, Wallace, Idaho.

Portland Railway Light and Power Company, Portland, Oregon.

Pacific Northwest Traction Company, Seattle, Washington.

Puget Sound Traction Light and Power Company, Seattle, Washington.

From July 1916 to October 1917, I was in charge of designing and installing a perpetual inventory and cost keeping system for the Puget Sound Traction, Light and Power Company, Seattle, Washington. This was the first complete system based upon engineering data to be installed in this country. It involved the making of plans showing all of the property in connection with the Light and Power System and Track System as well as a detailed inventory of the entire property, which was valued at approximately $50,000,000.

From October 1917 to July 1918, I was Assistant Engineer with Henry L. Gray, in connection with the valuation of the Portland Gas and Coke Company, Portland, Oregon.

From July 1918 to December 1920, I was Manager of Costs and Stores for G. M. Standifer Construction Corporation, Vancouver, Washington. This corporation constructed 10-9,500 ton steel cargo ships for the United States Ship- [1255] ping Board, 5-9,500 ton steel cargo ships for the Gray Star Line and 5-12,000 ton steel tankers for the

(Testimony of E. C. Willard.)

Standard Oil Company. During this time, I was in charge of all inspection, traffic and handling in connection with all raw materials, stores and supplies, preparation of all estimates, cost accounting and at the close of this engagement was also in charge of the Production Department.

From December 1920 to January 1921, I was with Henry L. Gray in charge of the valuation of the Gas properties of the Puget Sound Power and Light Company at Bellingham, Washington and the Street Railway properties of the Puget Sound International Railway and Power Company at Everett, Washington.

Since January, 1921, I have been in private consulting practice here in Portland. My engagements since opening my own offices have included:

Investigation of the Pacific Telephone and Telegraph Company for the City of Portland.

Investigation of the Bureau of Water Works for the City of Portland, this work having involved valuations and rate studies and also recommendations in regard to future construction, operating, accounting and financial policies.

Rainier Water System, Rainier, Oregon, in connection with proposed improvements.

Valuations and Rate Studies for the Coos Bay Water Company, Marshfield and North Bend, Oregon. [1256]

Design of High Pressure Fire System for the

(Testimony of E. C. Willard.)

City of Portland to serve the East and West Side Business districts.

Palatine Hill Water District and also Ardenwald Water Company on proposed improvements, including design of future systems.

Study of proposed improvements and also valuation and rate study for the South Bend Water Company, South Bend, Washington.

Investigation and valuation of the properties of the Oregon and Washington Telephone Company, Yakima Valley Telephone Company, Sunnyside Telephone Company and others in connection with property purchases and bond issues.

Valuation and investigation of the Salem Light and Water Company, Salem, Oregon, for the purpose of purchase.

Valuation and investigation of the Hoquiam Water Company, Hoquiam, Washington, in connection with condemnation proceedings.

Grants Pass Water Company, Grants Pass, Oregon, including valuations, design and other studies of proposed improvement program.

Dallas Water Company, Dallas, Oregon, in connection with the sale of that property.

Portland Electric Power Company in connection with rate investigation.

Portland Gas and Coke Company in connection with valuation, improvement programs, rates, utilization of natural gas, etc. [1257]

Edward Hines Lumber Company, Burns, Oregon.

(Testimony of E. C. Willard.)

including design and estimated cost of proposed light and power development, power contracts, etc.

Portland Chamber of Commerce, Industrial Reports, Comprehensive Study of Power Rates, etc.

Northwestern Electric Company, valuation of all properties owned in Oregon and Washington.

Pacific Power and Light Company, valuation of portions of properties.

Portland Gas and Coke Company, valuation of all properties in Oregon and Washington.

Peoples Water and Gas Company, valuation of Water System in Vancouver, Washington, for purpose of arbitration of purchase and also member of Arbitration Board.

Peoples Water and Gas Company, valuation of Water Systems in Hillsboro, Marshfield and North Bend, Oregon.

Pacific Power and Light Company, determination of the so-called "Original" cost of the entire property.

Washington Gas and Electric Company in connection with condemnation Proceedings looking to the purchase of the property of that Company.

In addition to the engagements listed, I have been retained by financial companies in connection with the determination of the feasibility of water supply projects, power and light projects, etc., for purposes of financing. [1258]

Q. I take it from that, then, that your experience has covered a period of some thirty-five years

of active contacts with public utility properties of all kinds and knowledge of the methods of their construction and the costs entering into such construction? A. It has.

Q. And has your experience also embraced the conditions under which public utility properties are maintained and the manner in which portions thereof from time to time may have to be retired from one cause or another? A. It has.

Q. What is the aggregate value of the public utility properties which have been valued by you or under your supervision?

A. Something over $500,000,000.00.

Q. And during the period of your residence here in Portland, where you have been practicing as a consulting engineer for the past twenty years, have you been familiar with the properties of the Northwestern Electric Company? A. I have.

Q. Have you made any investigation or inquiry into those properties, either now or at any other time? A. I have.

Q. To what extent are you familiar with the various parts and structures and items entering into the composite system of the Northwestern Electric Company? [1259]

A. I have been familiar with it during the processes of construction of a portion of it; I have been generally familiar with the whole system for the past twenty years and, specifically, I have made a detailed investigation of all of the properties of the Company.

(Testimony of E. C. Willard.)

Q. That includes the property in Washington as well as that in Oregon?

A. That includes both the Washington and the Oregon property.

Q. Have you determined the cost of reproduction of the properties of the Northwestern Electric Company used and useful in the generation, transmission and distribution of electric power and energy and in the rendering of steam heat service? A. I have.

Q. Were you employed by Northwestern Electric Company to prepare an inventory and appraisal of its property? A. I was.

Q. I assume that you were required to develop an engineering and technical staff to carry on this work were you not?

A. I was. Many of the engineers and other technical men working under my supervision either are or have been employes of Northwestern Electric Company, Pacific Power and Light Company or Portland Gas and Coke Company, but I also employed as members of my staff a number of other engineers and technical experts resident in this district who were particularly qualified for certain parts of this work. [1260]

Q. What properties are included in your inventory and appraisal?

A. All the properties of Northwestern Electric Company used and useful in the generation, transmission and distribution of electric power and

(Testimony of E. C. Willard.)

energy and in the rendering of steam heat service.

Q. Will you give us a brief description of these properties?

A. These properties consist of the Condit hydro-electric development, the Lincoln and Pittock steam generating stations, all of the Company's transmission lines, the various transmission and distribution sub-stations in Washington and Oregon, the distribution systems in Washington and in Oregon, including the distribution lines, services, transformers and meters, the underground electric distribution system in Portland, the steam heat distribution system in Portland, and all transportation equipment, office equipment and miscellaneous equipment owned by the Company, and used and useful in rendering electric and steam heat service.

Q. In what form did you prepare your inventory of these properties?

A. All the units of property in each location, such as the Lincoln steam plant, the individual substations, etc., were grouped together for convenience of identification, irrespective of the particular accounts to which such units were finally [1261] assigned, and were subsequently regrouped in conformity with the plant accounts provided for in the Uniform System of Accounts prescribed by the Oregon Public Utilities Commissioner. The total inventory consists of approximately 5000 pages of typewritten detail, divided into 79 sections. This inventory was prepared in such form as

(Testimony of E. C. Willard.)

to permit the convenient checking by field examination, of the various items going to make up the properties."

Q. (By Mr. Laing) Have you made a determination of the cost of reproducing the property and business of the Northwestern Electric Company, as of any particular date? A. I have.

Q. As of what date have you made that determination?

A. As of December 31, 1932; June 30, 1940; December 31, 1935; December 31, 1924.

Please state what your determinations were as of those dates of the reproduction cost of this property?

Mr. Slaff: At this point, Mr. Examiner, I object to any testimony of this nature and to the specific question asked by Mr. Laing on the ground that that type of evidence is not relevant or material to this proceeding. [1262]

The Trial Examiner: As to all of the dates, is that?

Mr. Slaff: Yes, sir. As I recollect, and as I understand, there is no relevancy, in my view, no materiality in this proceeding as to the reproduction,—as to evidence of the reproduction costs of the property, as to any of the dates stated by the witness.

The Trial Examiner: Does counsel have anything further to say as to its purpose in this rehearing?

(Testimony of E. C. Willard.)

Mr. Laing: Our purpose, Mr. Examiner, is to show by this witness, and by the testimony which he will give, if he were permitted to give it, what the values of this property were as to these several dates. As to the significance of the first date, that is the earliest date, that was at a time shortly before the purchase of the property by the American Power and Light Company. The date of the appraisal in 1932, is the date as of which Mr. Willard first made his complete investigation. It has no special significance, perhaps, except in that connection.

As to the date of December 31, 1935, that is the date as of which he made his determination of the basis on which the stockholders and directors of the company reduced the par value of the common stock from $10,000,000.00 to $3,500,000.00 in 1936.

As to the date of June 30, 1940; that is significant because it shows the values in this property as of a date ap- [1263] proximately current with this investigation.

The Trial Examiner: Do you propose to follow through an extensive course of discussion and evidence with regard to reproduction values as to all four of those dates?

Mr. Laing: As extensive as counsel on the other side are interested about the details

The Trial Examiner: What does counsel for the American have to say?

Mr. Priest: On behalf of the American Power

(Testimony of E. C. Willard.)

& Light Company, we urge, if the Examiner please, that the cost of reproduction on the dates stated by the witness and by Mr. Laing,—that evidence of such cost of reproduction on these dates is material and relevant evidence, as indicating one of the important criteria of the value of the property to the Northwestern Electric Company, inherent in the property of that company, and therefore accruing to the common stock of the Northwestern Electric Company, which the American Power and Light Company acquired and now owns.

The Trial Examiner: Do you cover all the dates in that or do you limit that to the one date which, I believe, was prior to your purchase of the stock?

Mr. Priest: No, we want all of those dates, if you Honor please, that is, each date, from and including December 31, 1924, the December 31, 1924 date, as indicating the value of the property of the company, immediately before its purchase by [1264] the American Power and Light Company; and the subsequent dates as indicative of the value of the property of the Company during the period while the American Power and Light Company has been the owner of the common stock.

Mr. Slaff: It is the position of the Commission's counsel that any evidence of reproduction costs as of the dates of December 31, 1932, June 30, 1940, December 31, 1935 or December 31, 1924 is absolutely immaterial and irrelevant for the consideration of the Commission on the sole issue that is before the Commission now in this rehearing.

(Testimony of E. C. Willard.)

I do not think we need to go into that extensively unless your Honor would like to hear extensive arguments. To me it is so plain that it requires no argument.

The Trial Examiner: The Trial Examiner rules that at present, at least, there has been nothing established, no evidence to justify the use of this method of establishing values. It may be that we may be able to lead to that with other evidence, but I certainly fail to see why the evidence of value as of 1940 is competent under any circumstances.

Mr. Laing: The significance of the value in 1940, as it would be if it was March 3rd, 1941, is the fact that we are being asked currently and now to write off an asset which we claim has a value of $3,500,000.00, and our position is that there is that value, and that there is therefore no right or reason for writing any part of it off; and the more [1265] nearly current the appraisal value is, the more relevance it has to this issue.

Now, as to the appropriateness of this evidence of the value, I do not think there can be any serious question that the evidence of cost of reproduction of the property, less its accrued depreciation, is evidence of value.

The Trial Examiner: It seems to me that the Commission has already ruled on the question of its value at the time of acquisition; and the additional question, perhaps, has been raised by the intervention of the American Power and Light Company,

(Testimony of E. C. Willard.)

as to what value there may be to the American Power and Light Company, or what value they gave it at the time of acquisition. So that there might be room for some question on that, that we are willing to hear further. But I can see no occasion for admitting the reproduction value as of the present date.

Mr. Priest: We urge on behalf of the American Power and Light Company that there was inherent in the properties of the Northwestern Electric Company, as of the time the American Power and Light Company acquired the stock of that Company, enhanced structural value which accrued to the common stock of the Northwestern Electric Company, and that reproduction costs new, less depreciation of the property of the Northwestern Electric Company as of that date, was one of the important, generally accepted criteria of such value. [1266]

We also urge that such reproduction costs, as of the later dates suggested, also is material and relevant on the ground that the American Power and Light Company is entitled to show the value of the properties of the Northwestern Electric Company, certainly as of 1936, when the stock which is presently owned was issued; and certainly as of the present time as indicative of present values of which Northwestern Electric Company and the American Power and Light Company, as the owners of its common stock, will be deprived by reason of the action proposed to be taken by this Commission.

(Testimony of E. C. Willard.)

Mr. Slaff: I do not think the issues here are any different from the issues in connection with some of the earlier exhibits, particularly Exhibit 79.

Mr. Laing: I agree with that, counsel.

Mr. Slaff: And with respect to the position of the American Power and Light Company, again there is not at issue here the problem of whether or not American thought there was value in the property as of 1925. Whatever the reasons that might have impelled them to make this purchase, there is no dispute, as I understand, over the amount that was paid by the American to the vendors of the stock, to-wit, just because of those values, because of those very factors, there is no reason, it seems clear to me, for what is apparently a retrospective valuation now as of 1925. It has no material- [1267] ity whatever. We are limited here in this rehearing solely and only to the purpose of determining a plan of disposition of an amount which, so far as the Commission is concerned, it has found to be an inflationary amount or write-up on the books of this company.

The Trial Examiner: Has the American Power and Light Company anything further to offer? I would say that except as to the year 1925 there is no question and for the present I see nothing to establish the right to introduce it as to 1925, so we will refuse the question or sustain the objection to counsel's question.

Mr. Laing: Mr. Examiner, may I then make a

(Testimony of E. C. Willard.)

formal offer of proof as to the testimony we propose to offer by this witness?

The Trial Examiner: You may.

Mr. Laing: We propose and offer to prove by and through Mr. Willard that he is thoroughly familiar, by reason of his detailed studies and examinations carried on since 1932, with the physical properties of the Company, with the Company's plant accounts and records, with labor rates and prices of utility materials and apparatus in the Pacific Northwest generally and in the Portland area particularly, with the cost of developing utility enterprises and their going value, with data furnished by manufacturers showing the prices of electrical apparatus, and with national price data reflecting in the cost of electric utility property generally; that [1268] he has determined the cost of reproduction of all the property of the Northwestern Electric Company used and useful in the generation, transmission, and distribution of electric power and energy and in the rendering of steam heat service as of June 30, 1940; that such cost of reproduction would be not less than $24,020,000 as of said date, including $653,000 for organization expense and $1,500,000 for going value; that such cost of reproduction less accrued depreciation would be not less than $20,900,000 as of said date and that the present level of prices of labor, apparatus and material which enter into the construction of electric utility and steam heat property is not lower

(Testimony of E. C. Willard.)

but, if anything, higher than the level of such prices prevailing on June 30, 1940; that Mr. Willard also has determined the cost of reproduction of said property of said Northwestern Electric Company as of December 31, 1924 and as of December 31, 1935, and that such cost of reproduction, less accrued depreciation, as of December 31, 1924 was not less than $13,750,000 and that such cost of reproduction, less accrued depreciation, as of December 31, 1935, was not less than $20,300,000; that, in Mr. Willard's opinion, the enhancement in the structural value as of December 31, 1924 of the [1269] property of the Northwestern Electric Company existing on that date over the structural value of such property as of the respective dates on which such property was first placed in operation, was not less than $3,250,000, giving full consideration to the depreciation which may have accrued on such property as of December 31, 1924; that Mr. Willard made detailed studies of the depreciation existing in the property of the Company, such studies having included (a) field inspections of such property by Mr. Willard himself, and by competent engineers acting under his direct personal supervision to determine the condition of such property, (b) studies of the age and expected life of various classes of property based upon the Company's records and other reliable sources, (c) consideration of deferred maintenance with respect to various items of property, (d) analysis of expenditures

(Testimony of E. C. Willard.)

made for replacement and maintenance for the purpose of determining the extent to which depreciation has been compensated by such expenditures and (e) surveys of the entire property to determine the extent of the obsolescence and inadequacy therein; that Mr. Willard developed a staff of competent, qualified engineers and technicians, including expert appraisers of real property, who, acting under his direct personal supervision, assisted him in the preparation of an inventory of the property of the Company which consisted of approx- [1270] imately 5000 pages of typewritten detail and in determination of reproduction cost of such property and that, finally, we are prepared to proceed with the presentation in detail of the studies, methods and findings used by Mr. Willard in developing the reproduction cost of the property of the Company on the dates indicated, and that a specific and detailed offer of proof would be of course, substantially as voluminous as the testimony of Mr. Willard himself.

That is the substance of what we would seek to establish by the testimony which we would present through Mr. Willard, if it were admissible, Mr. Examiner.

That is our offer of proof and I should like a ruling on that.

The Trial Examiner: The Trial Examiner rules that the purpose declared is not relevant to the issues before the Commission in this hearing.

(Testimony of E. C. Willard.)

Mr. Laing: Very well, we take an exception.

Mr. Priest: And the offer is rejected?

The Trial Examiner: Yes, the offer is rejected for that reason.

Mr. Laing: That is all the evidence we have to offer on behalf of the Northwestern Electric Company, Mr. Examiner.

Mr. Priest: Do you wish to cross examine Mr. Willard? [1271]

Mr. Slaff: No, I have no cross examination. Just this. Maybe you can tell me, Mr. Laing, just so the record will be clear. You made a statement as to the cost of reproduction as of 1924. As I understand it from your offer of proof, that estimate and the estimate as of 1935 have been recently made by Mr. Willard, is that correct?

Mr. Laing: That is correct.

Mr. Priest: Let's check with Mr. Willard about the 1935 estimate. That was made when?

The Witness: That was made in February, 1936.

Mr. Slaff: As to the 1924 estimates,—the estimate as of 1924 has been comparatively recently made?

The Witness: There have been two estimates made, one was about four years ago and one recently.

Mr. Slaff: I have no examination.

The Trial Examiner: Q. You made no estimate prior to the time that the American Power Company purchased the property?

(Testimony of E. C. Willard.)

The Witness: No.

Mr. Slaff: I have no cross examination.

Mr. Laing: As I said, Mr. Examiner, that is all the testimony we wish to offer on behalf of the Northwestern Electric Company. [1272]

LAURENCE H. PARKHURST,

called as a witness on behalf of the American Power & Light Company, being first duly sworn, testified as follows:

Direct Examination

By Mr. Barber:

Q. Please state your name and place of residence.

A. My name is Laurence H. Parkhurst, and my residence, Montclair, New Jersey.

Q. What position do you hold with the American Power & Light Company, which company is a party to this proceeding?

A. I am vice-president of the company.

Q. How long have you been a vice-president of American Power & Light Company?

A. Since November, 1935, and I was also a vice-president from sometime in 1929 to early in 1933.

Q. Have you examined or caused to be examined the books and records of American Power & Light Company for the purpose of ascertaining the cost to American Power & Light Company of the 100,000 shares of the common stock of Northwestern

(Testimony of Laurence H. Parkhurst.)

Electric Company which the American Company holds?

A. I have.

(American Power & Light Company's Exhibit No. 87 marked for identification.)

By Mr. Barber:

Q. I hand you herewith a statement marked Exhibit 87 [1273] for identification. Will you please identify this statement?

A. It is a statement showing the cost to American Power & Light Company of 100,000 shares of common stock of the Northwestern Electric which totals $5,021,799.33, including expenses incurred in connection with such acquisition.

Q. Was this statement prepared under your direct supervision?

A. It was.

Q. Does it accurately reflect the cost to the American Power & Light Company of the 100,000 shares of the common stock of the Northwestern Electric Company which the American Company owns?

A. It does.

Mr. Barber: I offer this in evidence, Mr. Examiner.

Mr. Slaff: Well, the substance has already been testified to, I think, in the original hearing, in round figures as approximately $5,000,000, and I have no objection to the accurate or explicit detail going into evidence at this time.

(Testimony of Laurence H. Parkhurst.)

The Trial Examiner: It may be admitted.

(American Power & Light Company's Exhibit No. 87 received in evidence.)

EXHIBIT NO. 87

AMERICAN POWER & LIGHT COMPANY

Investment in Northwestern Electric Company Common Stock

Cost of 100,000 shares of common stock of a par value of $100 each (subsequently reduced to a par value of $35 a share) purchased for cash		$ 4,999,447.23
Expenses in connection with the acquisition:		
Commission to H. P. Wilson, $2.00 a share on 4,025 shares, April 15, 1925		8,050.00
Payment to Guaranty Trust Company for expenses incurred in connection with investigation and negotiations leading up to purchase, March 16, 1925		2,000.00
Payment to Electric Bond and Share Company for services and expenses in connection with the acquisition		10,195.80
Traveling expenses Guy W. Talbot and John A. Laing, telegrams, transfer tax stamps and other miscellaneous expenses		1,331.30
Directors qualifying shares reacquired		25.00
Interest accrued at 6% per annum on funds advanced for purchase of stock		750.00
Total		$ 5,021,799.33

Feb. 14, 1941.

By Mr. Barber:

Q. Mr. Parkhurst, were you an officer of American Power & Light Company in 1925 when that company acquired the common stock of Northwestern Electric? [1274]

A. I was not.

(Testimony of Laurence H. Parkhurst.)

Q. Do you have any personal knowledge of the negotiations which resulted in American Power & Light Company's purchase of the common stock of Northwestern Electric Company?

A. No, I do not.

Q. Were any of the present officers or directors of the American Power & Light Company either officers or directors of that company in 1925, when such purchase was made?

A. No, they were not.

Q. Do you know, from your examinations of the books and records of the American Power & Light Company, or examinations that you caused to be made for you, whether any of the common stock of Northwestern Electric Company was purchased by American Power & Light Company from any associated or affiliated company?

A. None of it was so purchased.

Mr. Barber: I think you may cross examine.

Cross Examination

By Mr. Slaff:

Q. As I understand, none of this stock was purchased from Northwestern Electric Company, either? Is that right?

A. No, sir. Not according to the records I have checked.

Q. My statement is correct, is it?

A. Correct. [1275]

Q. Are there any directors or officers of Electric Bond & Share today who were directors or

(Testimony of Laurence H. Parkhurst.)

officers of Electric Bond & Share in 1925 at the time of this purchase?

A. I can't tell you. I have got no one in mind and I haven't the information here as to the present directors or officers of Electric Bond & Share.

Q. American Power and Light is of course a subsidiary of Electric Bond & Share?

A. Yes.

Mr. Slaff: I have no further questions of Mr. Parkhurst.

Mr. Barber: That's all.

RALPH W. LAWLOR,

recalled as a witness on behalf of American Power & Light Co., having been previously sworn, testified as follows:

Direct Examination

By Mr. Barber:

Q. You are the Mr. Lawlor who has previously testified at this hearing? A. I am.

Q. And I believe that you then stated that as assistant secretary and assistant treasurer of the company you had in your charge and under your supervision the books and [1276] records of the company? A. That is correct.

Q. And does that include the books and records showing the issuance of certificates and transfers of the common stock? A. That is right.

(Testimony of Ralph W. Lawlor.)

(American Power & Light Company's Exhibit No. 88 Marked for Identification.)

By Mr. Barber:

Q. Handing you exhibit marked 88 for identification, will you please identify that, Mr. Lawlor, and state what it comprises?

A. It is a transcript of the common stock transfer register of Northwestern Electric Company subsequent to March 1, 1925, and shows the holders of common stock prior to the transfer to American Power & Light Company.

Q. Will you please look at page 1 of this transcript and state for the record what each column on that page shows?

A. Column 1 shows the date of transfer, and on page 1 is March 3, year 1925; column 2, the certificate number; column 3, the number of shares; column 4, by whom surrendered.

Q. I assume that is true of each of the succeeding pages down through page 17 and including the first 5 lines on page 18?

A. That is correct.

Q. Now, calling your attention to the lower portion [1277] of page 18, beginning, "The foregoing listed certificates", will you state what is shown in the tabulation which is there set forth?

A. On page 18, column No. 1 indicates the date on which transfers were made to American Power & Light Company of certain certificates of common stock. Column 2 indicates the certificates reissued.

(Testimony of Ralph W. Lawlor.)

by numbers, and column 3, the number of shares.

Q. Now, calling your attention to the short tabulation on page 19, will you please identify and describe that?

A. Page 19 shows in column 1 the date of September 16, 1936, at which time the common stock was reissued to American Power & Light Company as reflected in column 2, certificate 1 and certificate 2; and in column 3, the number of shares, totaling 100,000.

The explanation in column 4 indicates to whom certificate No. 1 was issued and to whom certificate No. 2 was issued.

Q. As I understand it, these are the certificates which are now outstanding?

A. That is right.

Q. And a facsimile of which certificate is in evidence as Exhibit 84, previously identified?

A. That is correct.

Mr. Barber: We offer Exhibit 88 in evidence.

Mr. Slaff: I just haven't yet discovered until counsel [1278] tells me what the purpose of this offer is. I take it this does not necessarily show the beneficial holders of stock. Although it is a tabulation and shows what it purports to show, I still don't see its relevancy in this proceeding.

Mr. Barber: The witness has testified, as the Examiner will recall, that it is a direct transcript of the transfers shown in the records under his supervision, showing the previous owners and hold-

(Testimony of Ralph W. Lawlor.)

ers of record, and is offered for the purpose of showing that the acquisition of American Power & Light Company was from the public. It shows the diversity of holdings. It will be connected up later by an offer of proof of market value reflected in stock exchange prices at that time, and it also clearly supports the testimony of Mr. Parkhurst that the acquisition of this stock was not from affiliates or associates, and it is offered in support of the American Company's contention that it purchased this stock for value and that such acquisition entitles it to present recognition of the stock and to the protection of its rights therein.

The Trial Examiner: I don't think that the exhibit will be helped any by evidence of stock market value. It may have some value for certain purposes incidental to the case at trial. The Examiner will admit it for what it is worth. [1279] This is not a case before a jury and we can consider those things afterwards in passing upon them.

(American Power & Light Company's Exhibit No. 88 was received in evidence.)

(Testimony of Ralph W. Lawlor.)

EXHIBIT No. 88

NORTHWESTERN ELECTRIC COMPANY

Public Service Building
Portland, Oregon

[Northwestern Electric Company Seal]

State of Oregon
County of Multnomah—ss.

I, W. R. Lawlor, do hereby certify that I am the duly elected and acting Assistant Secretary of Northwestern Electric Company, and as such Assistant Secretary have access to and knowledge of the corporate books and records of said Company; that the following is a full and true transcript of that portion of the Common stock transfer register of said Company subsequent to March 1, 1925, showing the holders from whom the said Common stock was acquired by and transferred to the American Power & Light Company or to its nominees.

In Witness Whereof I have hereunto affixed my official signature and the corporate seal of said Northwestern Electric Company this 1st day of March 1941.

[Seal] R. W. LAWLOR,
Assistant Secretary.

(Testimony of Ralph W. Lawlor.)

Exhibit No. 88—(Cont.)

NORTHWESTERN ELECTRIC COMPANY

Transcript of that portion of the Common Stock transfer register of Northwestern Electric Company with respect to shares acquired by American Power & Light Company subsequent to March 1, 1925.

Date	Ctf. No.	No. Shares	By Whom Surrendered
1925			
Mar. 3	2620	25	A. Alanson
3	1218	100	B. E. Alanson
3	1219	100	do
3	1252	50	do
3	1346	50	do
3	1451	100	do
3	1453	100	do
3	1455	100	do
3	1542	100	do
3	1549	50	do
3	1573	100	do
3	1574	100	do
3	1954	3	do
3	2011	1	do
3	2291	100	do
3	2292	100	do
3	2325	100	do
3	2411	10	do
3	2467	100	do
3	2469	50	do
3	2566	15	do
3	2605	100	do
3	1241	1000	B. E. Alanson, Trustee
3	1504	100	do
3	2351	750	do
3	58	100	American Investment Co.
3	2004	100	do
3	57	100	Milton Aherbach
3	1928	100	do

(Testimony of Ralph W. Lawlor.)

Exhibit No. 88—(Cont.)

Date	Ctf No	No Shares	By Whom Surrendered
1925			
Mar. 3	1648	100	Alfred Baer
3	2319	100	Lucien Baer
3	306	100	A. N. Baldwin, Trustee
3	307	100	do
3	308	100	do
3	790	3	J. Barth & Co.
3	1035	5	do
3	1623	50	do
3	1657	45	do
3	1758	50	do
3	1822	10	do
3	2023	50	do
3	2066	20	do
3	2139	10	do
3	2371	100	do
3	2536	100	do
3	193	100	Julius Behrend
3	216	13	do
3	1952	187	do
3	1978	100	do
3	629	100	Albert M. Bender
3	1205	45	do
3	1207	50	do
3	1209	25	do
3	1227	50	do
3	1229	50	do
3	2363	150	H. Berh & Son
3	2364	50	do
3	669	10	Alfred Bettman
3	1204	5	do
3	670	10	Lawrence Bettman
3	1203	5	do
3	1907	10	Ada V. Bowers
3	2136	50	Alfred J. Brandenstein

Exhibit No. 88—(Cont.)

Date	Ctf. No.	No. Shares	By Whom Surrendered
1923			
Mar. 3	2214	100	Gustave Brenner
3	2215	100	do
3	2216	100	do
3	2217	50	do
3	1969	10	Delia Burke
3	917	100	B. W. Burridge
3	11	1	W. E. Coman
3	2576	100	Curran & Dwyer
3	2603	25	do
3	1625	50	E. A. Davis
3	1940	25	do
3	2063	25	do
3	2268	15	do
3	2276	50	do
3	2300	35	do
3	2338	10	do
3	2005	30	Margaret C. Davis
3	2546	20	do
3	1816	100	Charles J. Dearing
3	1817	100	do
3	1818	100	do
3	1819	75	do
3	1850	100	do
3	2162	300	Chas. M. Doty
3	912	250	Alfred Ehrman
3	913	250	Alexis L. Ehrman
3	1508	20	Norman A. Eisner
3	1512	30	do
3	1638	100	do
3	1641	100	do
3	955	50	Herman Elsbach
3	13	5000	H. Fleishhacker
3	70	2000	do
3	2194	5000	do

(Testimony of Ralph W. Lawlor.)

Exhibit No. 88—(Cont.)

Date		Ctf. No.	No. Shares	By Whom Surrendered
1925				
Mar.	3	2195	1000	H. Fleishhacker
	3	2196	1000	do
	3	2197	1000	do
	3	2198	1000	do
	3	14	5000	M. Fleishhacker
	3	1194	17000	do
	3	1915	100	J. Friedlander
	3	38	62	Mark J. Gerstle
	3	72	1000	do
	3	168	500	do
	3	1992	500	do
	3	1993	500	do
	3	1994	100	do
	3	1995	100	do
	3	1996	100	do
	3	1997	100	do
	3	1998	100	do
	3	1999	100	do
	3	2000	76½	do
	3	39	63	Wm. L. Gerstle
	3	71	1000	do
	3	167	500	do
	3	437	65	do
	3	464	100	do
	3	465	100	do
	3	466	100	do
	3	467	45	do
	3	513	1000	do
	3	514	500	do
	3	515	127	do
	3	1986	500	do
	3	1987	500	do
	3	1988	100	do
	3	1989	100	do
	3	1990	100	do

(Testimony of Ralph W. Lawlor.)

Exhibit No. 88—(Cont.)

Date 1925	Cft No	No Shares	By Whom Surrendered
Mar. 3	1991	100	Wm. L. Gerstle
3	1971	15	Max Goldberg
3	2013	100	do
3	2014	100	do
3	886	40	Louis C. Greene
3	1550	100	Edward B. Gundelfinger
3	1983	100	Greenswald Company
3	1984	100	do
3	1985	100	do
3	855	300	Bertha Haas
3	2395	500	Elise Haas
3	1833	210	Benno Hart
3	116	100	C. F. Hunt
3	117	100	do
3	554	100	do
3	555	100	do
3	556	100	do
3	557	100	do
3	2185	1000	E. H. Jensen
3	2186	1000	do
3	2187	1000	do
3	2188	1000	E. N. Jensen
3	2189	1000	do
3	2190	1000	do
3	2191	1000	do
3	2193	500	do
3	2203	100	do
3	2204	100	do
3	2205	100	do
3	2206	100	do
3	89	400	G. B. Levison
3	44	125	H. Levi & Co.
3	87	400	do
3	88	200	do
3	2403	25	The Milton I. Levi Co.

(Testimony of Ralph W. Lawlor.)

Exhibit No. 88—(Cont.)

Date	Cff. No	No. Shares	By Whom Surrendered
1925			
Mar. 3	2404	100	The Milton I. Levi Co.
3	2405	100	do
3	2406	25	do
3	2407	5	do
3	2408	50	do
3	2148	320	Alice M. Meyer
3	2149	320	C. Hillegass Meyer
3	2147	320	E. Alga Meyer
3	752	280	John Henry Meyer and John Freuler Trustees (under the will of Anton Boul, deceased)
3	1790	50	Julian J. Meyer
3	313	100	Selda Meyer
3	357	2½	Simon Meyer
3	935	50	do
3	942	50	do
3	956	30	do
3	974	10	do
3	980	35	do
3	983	10	do
3	986	5	do
3	1058	10	do
3	1093	20	do
3	1119	10	do
3	48	62	Gustave Neibaum Co.
3	93	500	do
3	2108	50	Arthur A. Newhouse
3	1786	50	W. D. Newhouse
3	1787	50	do
3	1788	100	do
3	1789	10	do
3	1829	100	John C. Newlands
3	1892	100	do
3	1893	100	do

(Testimony of Ralph W. Lawlor.)

Exhibit No. 88—(Cont.)

Date	Ctf. No.	No. Shares	By Whom Surrendered
1925			
Mar. 3	1894	100	John C. Newlands
3	2313	100	do
3	2314	100	do
3	2373	100	Plunkett, Lilienthal & Co.
3	2374	100	do
3	2375	100	do
3	2376	100	do
3	2613	65	do
3	2079	100	Pauline Raphsel
3	1183	84	Revel D. Robbins
3	124	500	R. I. Rogers
3	1514	100	Emma Rosenbaum
3	1543	320	do
3	2254	100	do
3	2255	100	do
3	2333	350	Rosenberg Brothers & Co.
3	1873	100	John Rosenfeld's Sons, a corp.
3	1874	100	do
3	1875	25	do
3	36	50	Sanford Sachs
3	219	500	do
3	114	200	Belle C. Schuline
3	2496	200	S. C. Schuline
3	2498	50	do
3	210	100	Simon C. Schuline
3	211	100	do
3	345	150	Carrie Schwabacher
3	845	75	do
3	126	225	Frank Schwabacher
3	341	75	do
3	1180	125	Norma B. Schwabacher
3	342	225	Sigmund Schwabacher Co.
3	521	65	do
3	526	10	do

(Testimony of Ralph W. Lawlor.)

Exhibit No. 88—(Cont.)

Date	Ctf. No.	No. Shares	By Whom Surrendered
1925			
Mar. 3	868	500	Sigmund Schwabacher Co.
3	1091	100	Frank Smith
3	2391	567	Jacob Stern
3	2393	333	Lucie Stern
3	2394	333	Lucie Stern, Trustee for Lucie Stern
3	2392	567	Sig. Stern
3	693	50	L. Strassburger
3	786	25	do
3	787	25	do
3	631	50	Herbert P. Tyson
3	1192	1000	R. E. Wallace, Trustee
3	1847	100	do
3	1848	100	do
3	1849	100	do
3	1850	100	do
3	1851	100	do
3	1852	100	do
3	1853	100	do
3	1854	100	do
3	2627	87	do
3	753	200	Cora K. Wolf
3	35	100	Max Wolf
4	1123	100	B. E. Alanson
4	1238	30	do
4	1567	100	do
4	1570	100	do
4	1759	100	do
4	1760	100	do
4	1768	20	do
4	2020	100	do
4	2042	40	do
4	2243	100	do
4	2073	100	B. E. Alanson, Trustee

Exhibit No. 88—(Cont.)

Date	Ctf. No.	No. Shares	By Whom Surrendered
1925			
Mar. 4	2352	250	B. E. Alanson, Trustee
4	2470	50	Alfred Baer
4	2539	100	J. Barth & Company
4	2614	5	do
4	2622	25	do
4	2355	47	Chonita Boreh
4	2359	47	Guadalups Boreh
4	2358	47	Grace Bovet
4	1731	30	Amby Buckley
4	1732	10	Elizabeth Buckley
4	2357	47	Alice Cotton
4	1958	450	Crocker Bank of S. F. Depository for Alien Property Custodian Trust 11818, 11820, 11821
4	2553	176	Milly Douglass
4	2361	3	John Freuter, Trustee
4	1709	25	Harry H. Goldman
4	874	100	Isabelle W. Goldman
4	884	200	John Joseph Hannigan
4	2618	100	A. C. Hellman & Co.
4	2619	100	do
4	2611	100	A. A. Housman & Co.
4	1312	3	O. F. Johnson
4	1323	5	do
4	2552	176	August Leege
4	2551	352	Charles O. Leege
4	2621	100	Leib, Keyston & Co.
4	2625	100	do
4	2356	47	Sophie Lewis
4	1415	575	Lillie B. Lilienthal
4	42	90	Wm. H. Metson
4	838	100	do
4	839	100	do
4	840	100	do

(Testimony of Ralph W. Lawlor.)

Exhibit No. 88—(Cont.)

Date	Ctf. No.	No. Shares	By Whom Surrendered
1925			
Mar. 4	841	100	Wm. H. Metson
4	842	100	do
4	843	100	do
4	844	100	do
4	1331	5	Ward B. McMakin
4	1337	5	do
4	1375	10	do
4	1376	20	do
4	1401	10	do
4	1594	52	do
4	1121	50	A. J. Pohl
4	1861	10	Edward Pollitz & Co.
4	1878	10	do
4	2218	10	do
4	2241	15	do
4	2337	20	do
4	2610	35	do
4	2617	100	do
4	1236	50	Geo. L. Rasmussen
4	1571	75	Cora B. Ross
4	969	50	Geo. Schammel
4	2592	100	Strassburger & Co.
4	2809	50	do
4	2533	50	Sutro & Co.
4	2534	50	do
4	2535	50	do
4	2555	50	do
4	2547	100	G. K. Wentworth
4	1883	500	Miss Delia Wolf
4	1979	760	do
5	2540	20	C. S. Lawrence
6	16	100	C. F. Adams
6	1456	10	Ingwald A. Alsager
6	1481	10	do
6	2096	30	do

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Exhibit No. 88—(Cont.)

Date	Ctf. No.	No. Shares	By Whom Surrendered
1925			
Mar. 6	2144	25	Ingwald A. Alsager
6	1801	100	Anglo California Trust Co. Pledges
6	1802	100	do
6	1803	100	do
6	2452	1	R. O. Ballinger
6	847	30	J. Barth & Co.
6	2323	5	Roy D. and Mary S. Beom Jt. etc.
6	1520	1	Myrtle Bell
6	1716	5	J. B. Bilderback
6	1793	25	A. J. Billings
6	1884	50	do
6	1806	100	do
6	1920	75	do
6	1927	150	do
6	2210	50	do
6	2266	50	do
6	2070	30	C. D. Bo-Dine
6	2086	25	do
6	2087	25	do
6	2220	100	do
6	2121	20	do
6	2232	85	do
6	2307	300	Robert C. Bolton
6	2308	30	do
6	2309	70	do
6	1718	5	A. E. Bradshaw
6	2580	100	do
6	2561	5	Burpee A. Brown
6	2558	2	Orval V. & Mary Ellen Bryan Jt. etc.
6	609	100	W. E. Coman
6	2607	50	Curran & Dwyer
6	2615	50	do

(Testimony of Ralph W. Lawlor.)

Exhibit No. 88—(Cont.)

Date	Ctf. No.	No. Shares	By Whom Surrendered
1925			
Mar. 6	1905	20	Miss A. M. DeMartini
6	46	50	F. A. Denicke
6	1551	30	J. J. Didier
6	2112	100	do
6	2458	10	Hattie Downing
6	2118	5	Hattie M. Downing
6	2253	5	do
6	1944	10	David and Mary A. Dupee Jt. etc.
6	2504	5	do
6	2479	10	Herman Eichenberger
6	1606	10	Jessie E. Farrell
6	1476	100	Robert S. Farrell
6	1559	15	Thos. G. Farrell
6	2430	10	Hanna L. Ferrey
6	1527	10	Dan Flood
6	1528	20	do
6	1898	25	do
6	1899	25	do
6	1900	25	do
6	1901	25	do
6	2267	85	do
6	2289	40	do
6	2302	10	do
6	2303	100	do
6	1679	100	John R. Freeman
6	1680	100	do
6	1681	100	do
6	1682	100	do
6	1683	100	do
6	1684	100	do
6	1685	100	do
6	1686	100	do
6	1687	100	do

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Exhibit No. 88—(Cont.)

Date 1925	Ctf. No.	No. Shares	By Whom Surrendered
Mar. 6	1688	100	John R. Freeman
6	1689	100	do
6	1690	100	do
6	1691	100	do
6	1692	100	do
6	1693	100	do
6	1694	100	do
6	1695	100	do
6	1696	100	do
6	1697	100	do
6	1698	100	do
6	1620	25	Louis Gossner
6	2549	8	Minnie Gates
6	2564	3	W. M. Getchell
6	2454	1	M. H. and Myrtle E. Goodwin Jt. etc.
6	2486	1	do
6	1868	20	J. E. Hanna
6	1869	20	do
6	2512	5	Dusinus Hansen
6	2172	50	Herman Heaston
6	1552	8	Edith M. Hopp
6	1903	2	Geo. W. Hopp
6	1605	10	H. L. Idleman
6	1949	25	do
6	2222	15	do
6	2426	5	W. J. Idleman
6	2434	10	O. D. Ireland
6	1519	1	Harry D. Jaeger
6	2288	30	R. C. Jenkins
6	1301	5	Jessie S. Jones
6	1329	1	Jessie S. Jones
6	1411	3	do
6	2600	5	R. C. Kenney
6	2443	10	Edward W. and Esther Weniger King, Jt. etc.

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Exhibit No. 88—(Cont.)

Date	Ctf. No.	No. Shares	By Whom Surrendered
1925			
Mar. 6	2538	5	Paul Kapp
6	1794	5	Arthur D. Leach
6	2595	5	Leib Keyston & Co.
6	2629	20	do
6	2459	5	Arthur H. Lewis
6	2166	20	Martin Lofthus
6	2167	20	do
6	2181	10	J. W. Lasher and Angie Lasher, husband & wife Jt. etc.
6	1840	10	C. W. Lowe
6	1968	2	do
6	1457	10	C. A. Luellen
6	1617	5	do
6	2246	35	do
6	2378	10	Lenora Massee
6	2451	2	Bonnie Merrill
6	1493	100	L. T. Merwin
6	2036	100	S. T. Meyer
6	1593	5	J. L. Miller
6	2983	5	J. L. Miller
6	15	100	A. L. Mills
6	1327	5	Geo. B. Mims
6	1469	5	do
6	1546	5	do
6	2330	4	Harriet A. Myers
6	2366	2	do
6	2329	4	R. D. Myers
6	2365	2	do
6	897	12	Fanny Newman
6	1412	5	J. H. Oliver
6	1439	5	do
6	1482	10	do
6	1885	50	do
6	1930	50	do

(Testimony of Ralph W. Lawlor.)

Exhibit No. 88—(Cont.)

Date	Ctf. No.	No. Shares	By Whom Surrendered
1925			
Mar. 6	2249	50	J. H. Oliver
6	2258	5	do
6	2495	30	do
6	1877	15	H. W. Olson
6	1540	15	Andrew Petersen
6	2202	50	Andrew & Johanna Peterson Jt. etc.
6	2037	35	Miss Johanna Peterson
6	2111	50	Miss Marie G. Pickering
6	2612	35	Plunkett, Lilienthal & Co.
6	2616	40	do
6	2120	25	do
6	2630	100	do
6	1182	250	Sadie M. Robbins
6	2455	1	J. E. Rohr
6	898	13	M. N. Rosenblatt
6	2050	25	Cora B. Ross
6	1428	5	Peter Roth
6	2449	5	do
6	2543	10	Jacob Scherind
6	2584	10	do
6	2461	5	Everett B. Scott
6	2577	5	W. E. Sharp
6	2009	1	C. J. Simpson
6	1870	20	E. F. Smith
6	1871	20	do
6	1872	20	do
6	1950	20	do
6	1595	3	Frank Spreadborough & Carrie Spreadborough Jt. etc.
6	1604	2	do
6	1730	3	do
6	1771	2	do
6	1887	1	do

(Testimony of Ralph W. Lawlor.)

Exhibit No. 88—(Cont.)

Date	Cft. No.	No. Shares	By Whom Surrendered
1925			
Mar. 6	1972	10	Frank Spreadborough & Carrie Spreadborough Jt. ete
6	2250	10	do
6	2306	2	do
6	1770	1	William C. Spreadborough
6	1886	1	do
6	2515	3	William J. Steinhauser
6	2554	1	Louis Sutter, Executor for Estate of Chas. F. Leege, Deceased
6	1591	15	J. V. Swan and Mary E. Swan
6	2490	10	do
6	2448	10	John F. Ullman
6	2506	15	do
6	896	100	Union Trust Company of San Francisco, trustee under the last will and testament of William K. Chadbourne
6	2423	2	E. E. VanAlstine
6	2342	40	O. Vedvei & Edna J. Vedvei
6	2343	50	do
6	108	200	Eli Wieh
6	235	280	Elsa R. Weih
6	2508	3	Mary L. Wilson and Pauline Wilson
6	1381	7	Dorothy Ziegler
7	2517	1	J. T. and Effie C. Adkins Jt. ete.
7	1925	5	Mrs. Susan Bales
7	1332	5	Wallace Bartle
7	2608	6	E. L. Brown
7	1333	2	Clarris Churchill
7	2283	2	Sherman B. Clark

(Testimony of Ralph W. Lawlor.)

Exhibit No. 88—(Cont.)

Date	Ctf. No.	No. Shares	By Whom Surrendered
1925			
Mar. 7	2487	5	James Denholm
7	2548	2	Hannah Elgstrom
7	1353	1	Joseph L. Fearey
7	1459	2	Fred A. Hockett
7	1304	3	Doreas E. Hallam
7	1061	25	Arthur Harris
7	1060	25	Jerome Harris
7	1270	2	J. I. Hemming
7	1335	2	Wm. Hey
7	1435	50	Otto Holtzen
7	2421	5	Henrietta Hoyser
7	2324	6	C. Z. Idleman
7	2328	4	C. Z. Idleman
7	2369	5	do
7	2420	4	do
7	2159	25	A. W. Kaseweter
7	1517	15	O. L. LeFever
7	194	240	Julis Levy
7	214	25	do
7	1157	20	do
7	1152	2	Jules, Levy, Trustee
7	2503	10	N. P. Longeteig
7	2623	50	Irving Lundberg & Co
7	2631	50	do
7	2602	35	R. R. Mayfield
7	1529	20	G. W. Mettler
7	2425	10	E. J. and Fanny P. Meyers Jt. Ete.
7	2583	5	Jessie E. Munford
7	1059	10	Daniel O'Connor
7	1982	10	do
7	1379	5	Albert Rives
7	1474	10	do
7	2295	5	do

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Exhibit No. 88—(Cont.)

Date 1925	Ctf. No.	No. Shares	By Whom Surrendered
Mar. 7	2311	5	Albert Rives.
7	2344	2	do
7	2383	1	do
7	2429	22	do
7	1185	29	Lloyd M. Robbins
7	1964	100	I. N. Rosekranz
7	1836	5	Myer C. Rubin
7	1045	20	Peter Sarsfield
7	923	10	Edward Scanlon
7	936	10	do
7	1723	50	Joseph, Marie Scheidecker
7	2474	15	do
7	2604	2	Edna Froyd Scott
7	2545	4	L. T. Scholt
7	2513	3	Caroline L. B. Sigrist
7	2475	10	E. W. and Mary E. Smith Jt. Etc.
7	2088	20	Godfrey L. Smith
7	2632	50	Sutro & Co.
7	1184	10	Emma R. Sutton
7	2835	45	J. G. Tavares
7	1518	10	F. G. Waddell
7	1607	10	do
7	2286	5	do
7	2478	5	F. B. Witherill
7	2224	1	Theresa Carroll York
19	1921	5	William & Gertrude Allston Jt. etc.
19	2414	2	Alvilde Aarnes
19	1324	16	A. M. & Mary Hendon Anderson Jt. Etc.
19	1538	2	Geo. V. Apel
19	1841	4	do
19	2281	2	Stella Matthews Arnspiger

(Testimony of Ralph W. Lawlor.)

Exhibit No. 88—(Cont.)

Date	Ctf. No.	No. Shares	By Whom Surrendered
1925			
Mar. 19	2465	1	Hugh A. & Dorothy O. T. Ayres Jt. etc.
19	2453	2	W. A. Ayres and Nancy A. Ayres Jt. etc.
19	2227	4	Mrs. Carol P. Baker
19	2450	10	Leo H. Baruh
19	1495	5	H. W. Bates
19	2562	2	Gladys Baughman
19	2084	25	Clara J. Baum
19	2102	25	do
19	1345	8	Geo. and Clara A. Bauman Jt. etc.
19	1354	2	do
19	1279	5	E. V. Berwick
19	2492	10	E. M. Blurock
19	1866	6	Catherine Bodeau
19	2025	3	do
19	1311	3	Chet G. Brown
19	2310	6	Florence N. Brown
19	2476	2	do
19	1398	1	Susie A. Brown
19	1378	5	Chas. S. Brownlee
19	1480	10	G. E. Bundschuh
19	1738	6	do
19	2422	4	Edna Cameron
19	2481	1	do
19	1271	1	J. B. Case
19	2529	2	J. B. and Viola V. Case Jt. etc.
19	2483	2	Cora E. Coleman
19	1589	6	W. Ray Cox and/or Gertrude C. Cox Jt. etc.
19	1633	5	do
19	1309	1	R. Crosbie

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Exhibit No. 88—(Cont.)

Date	Ctf. No.	No. Shares	By Whom Surrendered
1925			
Mar. 19	2368	2	W. J. Dennis
19	1467	4	James Durkheimer
19	1441	3	Stuart Durkheimer
19	2336	10	Mrs. Hazel Evans
19	1275	1	Max Fleming
19	1278	1	do
19	1717	5	Geo. H. Ganiere
19	1140	5	Marie F. Greenberg
19	1924	2	A. W. and Winnie S. Haines Jt. etc.
19	2024	1	do
19	1339	2	F. G. Harcourt
19	1763	5	Mrs. Mabel Haskell
19	2480	3	Mamie Hayre
19	2397	5	James and Elizabeth Hill Jt. etc.
19	2059	25	Thos. Hodson
19	2409	20	do
19	1285	1	O. L. and Bessie M. Holt Jt. etc.
19	1319	1	do
19	1291	1	Roy H. Hunt
19	1383	1	do
19	2510	5	Chas. and Maud M. Johnson Jt. etc.
19	2003	1	Katherine Owen Johnson
19	2488	3	Terrence F. and Laura A. Johnson Jt. etc.
19	1377	1	H. D. Kennedy
19	2381	7	Annie L. Kent
19	2382	13	do
19	1288	5	S. M. Kerron
19	1967	2	Jeannette T. Kingery
19	2016	2	do

(Testimony of Ralph W. Lawlor.)

Exhibit No. 88—(Cont.)

Date 1925	Ctf. No.	No. Shares	By Whom Surrendered
Mar. 19	2279	4	Jeannette T. Kingery
19	1959	1	Chas. F. Kinney
19	2251	1	do
19	1305	3	Geo. L. Kaehn
19	1330	10	do
19	1400	10	do
19	1494	10	do
19	2477	2	V. E. Kuhn
19	2527	2	do
19	1320	1	J. V. Lankin
19	2184	10	J. Lauterstein
19	2445	3	William E. Leahy
19	1553	5	Lee L. and Anna Ray Jt ete.
19	1356	2	Beryl S. Ledgerwood
19	2058	10	Mrs. Francis E. Leehan
19	2521	1	do
19	1369	200	Helena Leibes
19	2484	2	B. E. Loomis
19	2501	10	B. E. Clara J. Loomis Jt ete.
19	1344	5	Albert Lundstrum
19	1811	7	J. W. Mathews
19	1292	1	Arnold Mayback
19	17	100	Julius Meier
19	2480	2	C. C. Meyer
19	1418	60	Ossiene Meyer
19	2559	5	Mark P. Miller
19	1385	5	Frank T. Mitlauer
19	1712	12	F. T. Mitlauer
19	1359	10	Frank T. and Kathryn J. Mitlauer
19	1843	5	James F. McConnell
19	1313	1	P. L. McGrath

(Testimony of Ralph W. Lawlor.)

Exhibit No. 88—(Cont.)

Date	Ctf. No.	No. Shares	By Whom Surrendered
1925			
Mar. 19	2578	1	J. D. McKay
19	1374	1	Ida B. Nelson
19	2516	1	do
19	1734	3	J. Arthur Norman
19	1733	5	M. O. Norman
19	2416	1	J. J. O'Brien
19	1796	10	Francis Corbin Oliver
19	2444	5	Clifford J. and Carrie S. Owen Jt. etc.
19	2494	2	Cecile E. Paine
19	1357	1	Annie M. Pearce
19	2271	5	Nels J. and Hannah Pearson Jt. etc.
19	2128	3	Peter Pearson
19	1277	1	W. C. Peer
19	1317	1	Esther R. M. Pfaft
19	1316	1	Naomi S. Pfaft
19	1315	1	Ruth A. Pfaft
19	1431	2	Wm. Pfaft
19	1298	6	do
19	2334	15	J. F. Potter
19	2349	25	do
19	2560	5	J. C. and Julfa Powers
19	2485	1	E. P. Rands
19	2531	1	do
19	1273	3	Geo. A. Read
19	2585	5	Mona B. Rees
19	1187	41	W. C. Robbins
19	2544	1	F. Harold Robinson
19	605	30	Georgia Robinson
19	853	20	do
19	1960	1	J. W. Rogers
19	2221	2	Max Rosine
19	2230	2	do

(Testimony of Ralph W. Lawlor.)

Exhibit No. 88—(Cont.)

Date	Ctf. No.	No. Shares	By Whom Surrendered
1925			
Mar. 19	2463	1	Max and Julia Rosine
19	40	15	H. C. Schroeder
19	1328	5	Otto and Agnes Schumann Jt. etc.
19	127	50	Leo S. Schwabacher
19	1616	2	Amos E. Scruggs
19	1427	3	Amos E. and Thilla B. Scruggs Jt. etc.
19	1141	20	Thos C. Seebaldt
19	1410	2	A. W. Sheehan
19	1484	1	A. W. and Insta Sheehan Jt. etc.
19	1902	10	do
19	946	50	I. Shenanski
19	947	50	do
19	2389	60	Henry Simsheimer
19	2473	6	Gertrude I. Snow
19	2471	1	L. M. and Gertrude I. Snow Jt. etc.
19	1719	2	L. M. and Gertrude Snow
19	2457	10	Allie Stayton
19	2507	20	Louis A. and Louise F Steinhauser Jt. etc.
19	1326	3	Sun Soon Huie
19	2273	20	George Suttle or Mrs. Martha L. Suttle, Jt. etc.
19	1306	3	W. M. Swicegood
19	1578	5	M. R. Tollishaug
19	1775	5	do
19	1996	5	Albert M. Tomsheck
19	2160	20	do
19	2447	10	D. W. Turnure
19	1526	1	Mildred L. VanAvery
19	1430	10	Kathie Voges

(Testimony of Ralph W. Lawlor.)

Exhibit No. 88—(Cont.)

Date	Ctf. No.	No. Shares	By Whom Surrendered
1925			
Mar. 19	1300	5	Herman H. Volstorff
19	1362	3	do
19	1579	25	Joseph Waddell
19	1750	50	do
19	1751	25	do
19	1752	13	do
19	2035	75	do
19	2040	65	do
19	2041	35	do
19	1426	25	Joseph and Lida N. Waddell Jt. etc.
19	1449	50	do
19	1478	25	do
19	2519	20	Caroline Waddle
19	160	100	Herman Waldeck
19	161	100	do
19	2435	10	Davis Wilcox
19	2440	13	W. H. Wilson and Lila M. Wilson Jt. etc.
19	2574	40	Chas. Woodhouse
19	1429	3	C. J. and Lois N. Wright Jt. etc.
19	320	500	A. W. Burchard
19	2472	3	Carl Daisy Abraham Jt. etc.
19	356	10	Rose N. Blum
19	1438	3	K. and Elizabeth Carlisle Jt. etc.
19	1322	2	A. W. Cauthorn
19	1618	2	James B. Chiotti
19	1955	10	Adah M. Clark
19	2008	1	Cora L. Cochran
19	2582	3	E. H. Cummings
19	1497	2	R. G. Drake

(Testimony of Ralph W. Lawlor.)

Exhibit No. 88—(Cont.)

Date	Ctf. No.	No. Shares	By Whom Surrendered
1925			
Mar. 19	1936	1	Louise Ingram
19	2015	1	do
19	1499	2	A. T. Kellogg
19	1287	1	Jessie M. Kincaid
19	2431	2	Iver W. Lee
19	1278	1	G. O. Madison
19	1792	1	John Michaelson
19	1314	1	W. L. Miller
19	2491	1	E. P. Mitchell
19	1307	2	F. J. McGrath
19	1281	3	E. S. Nelson
19	1340	1	Olaf Olson
19	1839	2	W. A. Packard
19	2126	1	Arthur Neil Pairan
19	1388	1	C. H. Pairan
19	123	500	Geo. M. Reynolds
19	1981	100	H. L. Shepard
19	1828	12	Geo. C. Sibly
19	2441	23	Ellen D. Smith
19	2180	5	C. V. and Hanna Taggart, Husband & wife Jt. etc.
19	1961	5	do
19	1599	1	Gloria Vocino
19	2179	50	Peter Wagner & August Wagner, husband & wife, Jt. etc.
19	1919	100	Camille A. Cavalier
19	1590	20	William F. Davis
19	2028	5	do
19	2029	10	do
19	2233	15	do
19	1835	5	Kathryn D. Duryea
19	1609	5	H. F. Ong
19	1610	5	do

(Testimony of Ralph W. Lawlor.)

Exhibit No. 88—(Cont.)

Date	Ctf. No.	No. Shares	By Whom Surrendered
1925			
Mar. 19	1611	35	H. F. Ong
19	1639	75	do
19	1724	10	Frank C. and Mary C. Riggs
19	2606	25	E. L. Sherman
24	1479	20	Michael and Anna Barber Jt. etc.
24	2229	5	William T. Bell
24	2424	5	Josephine Bassatti
24	2427	5	Peter Bassatti
24	1176	130	Geo. Chandler and Luella Chandler
24	1303	5	N. V. Crocker
24	2280	2	do
24	1742	10	Lena L. Egolf
24	1842	4	Lena Egolf
24	1922	1	do
24	1361	7	Emile Prutiger
24	1715	9	F. H. and Louise Gordon
24	1297	12	Paul Riegel
24	1741	5	Mary E. Smith
24	1844	3	do
24	1923	2	do
24	1525	2	E. N. and Zoe Southwick
24	1173	80	Flora Speigelberg
Apl. 8	2493	5	H. B. Bickner
8	2442	10	do
8	2496	5	John and Pearl Bickner
8	2462	5	do
8	2464	1	Lillian Bickner
8	2563	2	Mary A. Bickner
8	2514	3	do
8	2360	47	Antonine A. Borel
8	2505	3	Geo. A. Fetsch

Exhibit No. 88—(Cont.)

Date	Ctf. No.	No. Shares	By Whom Surrendered
1925			
Apl. 8	1608	5	Chas. J. Fisher
8	1615	1	do
8	639	100	Albert Joseph
8	1370	5	Herbert C. Leiser
8	1380	1	Peter A. Leipsig
8	157	50	Henry H. Netter
8	1713	10	J. J. Small
8	2287	1	John J. Small
8	2433	1	Ada M. Stuhr
8	2413	50	Penna Co. U/W David Netter
8	1507	100	Elizabeth Tietjen
8	2054	10	Gordon Winkler
29	1496	3	H. L. Landon
29	1597	2	do
29	107	500	H. P. Wilson
29	1392	1	J. H. and Blanche E. Hanna
29	1423	1	do
29	2127	8	do
29	2385	10	do
29	2002	1	W. C. Lacy
29	2115	1	A. Olsen
29	2169	3	do
29	1600	10	Frank Cook
May 12	1592	300	Fanny K. Haas
12	1748	5	Wm. T. and Lucy Bell
12	2263	5	Richard Carol Weil
12	2262	5	Margurite Rossin Weil
12	1372	10	Ethel M. Garvin Foote
12	2092	5	John P. Gerardy
12	2176	2	J. A. and Jenny M. Mathie
20	1151	10	Gaston Pollack
20	1153	10	Walter Pollack
20	1154	20	Leon Levy

(Testimony of Ralph W. Lawlor.)

Exhibit No. 88—(Cont.)

Date	Ctf. No.	No. Shares	By Whom Surrendered
1925			
May 20	1158	20	Chas. Levy
20	1970	30	Mary McConnell
20	2261	10	Margaret Levy Finger
June 2	1368	100	William D. Connor
2	1777	100	Mrs. Elsa Connor
2	1778	100	do
2	2264	2	Chas. H. and Cora M. Leonard
30	1257	1	Mrs. E. J. Oakes
30	1258	1	do
30	1259	1	do
30	1260	1	do
30	1261	1	do
June 30	1262	1	Mrs. E. J. Oakes
30	1263	1	do
30	1264	1	do
30	1265	1	do
30	1266	1	do
30	1295	5	Geo. Ertle
30	1350	5	Guy Mount
30	1458	5	Guy E. Montgomery
30	2654	10	John K. Pearce
July 5	1269	5	Anna Wade
5	1471	5	A. C. Kendall
5	2659	3	Con Silver
5	2502	10	J. F. and Lillian M. Dickson
Aug. 27	1186	41	Marie R. Hilbert
26	2643	2	Ellen D. Smith
26	2541	3	Gracio Montgomery
26	2370	2	Spencer Raynor
26	2318	2	George V. Apel
26	1721	9	H. S. Montgomery
26	1399	1	E. S. Brown

Exhibit No. 88—(Cont.)

Date	Cer. No.	No. Shares	By Whom Surrendered
1925			
Aug. 26	1321	2	Y. L. Sharp
Sept. 22	2556	35	John Ames
Dec. 22	2089	10	S. W. and Eugenia Fryer
22	2690	10	do
22	2636	3	W. M. Bonschbach
31	1282	3	George L. Wey
31	1293	3	Wm. H. McAfee
31	1299	5	Margaret Nugent
31	1308	1	P. Hinz
31	1358	5	W. E. Ginder
31	1394	1	E. A. Nair
31	1424	1	Edward A. Weir
31	1483	3	Henry Legler
31	1539	10	Steve Herman
31	1834	5	Oscar G. Downing
31	1945	5	H. R. and Sylvia Reid
31	2152	10	Henry and May E. Funk
31	2170	1	Axel Anderson
31	2174	20	Gordan Winkler
31	2175	5	Eunice M. Downing
31	2259	20	P. W. Knowles
31	2518	1	Helen L. Zwingli
31	2542	3	R. E. Ure
31	2586	3	do
31	2599	5	E. C. Oliphant
1926			
Feb. 6	1334	1	C. W. Barsee
6	1336	1	do
6	1387	1	do
6	1498	2	C. W. and Mabel M. Hagle
6	2628	3	do
6	1780	2	J. E. Rowland
6	1946	5	Fred J. Kruckman

(Testimony of Ralph W. Lawlor.)

Exhibit No. 88—(Cont.)

Date	Ctf. No.	No. Shares	By Whom Surrendered
1927			
Dec. 1	2664	50	Alfred O. Luneschloss
20	1289	2	E. L. Sherman
1930			
June 4	1341	1	Blanche Young
4	1342	2	Rosetta H. Wilson
1935			
May 4	1	1	M. M. Connor
1936			
Apl. 8	2676	1	Paul B. McKee
8	2678	1	Guy W. Talbot
Sept. 14	2644	1	John A. Laing
14	2675	1	Kenneth D. Dawson
Total		100,000	

The foregoing listed certificates in the number of shares set opposite thereto, were transferred to American Power & Light Company or its nominees as follows:

Date	Ctf. No.	No. of Shares
March 3, 1925	26333	78,387
" 4, "	2634	7,127
" 5, "	2637	20
" 6, "	2638	7,286
" 7, "	2639	1,153
" 19, "	2640	2,105
" 19, "	2641	500
" 19, "	2642	753
" 19, "	2647	310
" 24, "	2652	307
April 8, "	2653	415
" 29, "	2655	525
" 29, "	2656	15
May 12, "	2657	315
" 12, "	2658	17
" 20, "	2660	100

(Testimony of Ralph W. Lawlor.)

Exhibit No. 88—(Cont.)

Date	Ctf. No.	No. of Shares
June 2, 1925	2661	302
" 5, "	2662	23
" 30, "	2663	35
Aug. 1, "	2666	41
" 26, "	2665	21
Sep. 22, "	2667	35
Dec. 22, "	2668	23
" 31, "	2669	110
Feb. 6, 1926	2670	15
Dec. 1, 1927	2671	50
" 20, "	2672	2
June 4, 1930	2674	3
May 4, 1935	2679	1
April 8, 1936	2680	2
Sept. 14, 1936	2681	2
Total		100,000

The par value of the common stock was reduced from $100 per share to $35 per share pursuant to action taken at the stockholders meeting held on September 16, 1936, and 100,000 shares of outstanding $100 par value common stock were exchanged for 100,000 shares of $35 par value common stock.

The $100 par value common stock certificates held by American Power & Light Company or its nominees, as listed on page 18 hereof, were surrendered and the following $35 par value common stock certificates were issued.

Date	Ctf. No.	No. Shares	To Whom Issued
Sept. 16, 1936	1	8	American Power & Light Company
Sept. 16, 1936	2	99,992	Frank L. Smiley (a nominee of American Power & Light Company)
Total		100,000	

(Testimony of Ralph W. Lawlor.)

Q. By Mr. Barber:

Q. Mr. Lawlor, I hand you a book, the title of which is "Walker's Manual of California Securities and Directory of Directors, 25th Edition", and ask if you are familiar with that book, generally familiar?

A. I am acquainted with it in a general way, yes.

Q. I may say to the Examiner that Walker's Manual has been previously referred to in the hearing with reference to Northwestern's reclassification of accounts, that it was employed at that time as an authoritative source of evidence which was presented by the Company, and was also employed by counsel for the Commission in his cross examination, and with respect to the introduction of other evidence which he then offered:

I say this because we have no copy available to use that we can offer as an exhibit for the files.

Mr. Slaff: I have as yet no objection to the fact that there is just a single volume here before the witness and for our use. I have seen the book, and I think we did use it at the last hearing. My recollection is that I used it for the directory of directors part of the book rather than for any other part.

The Trial Examiner: Do I understand counsel that he is offering this one copy? [1280]

Mr. Barber: No, I just meant to identify the volume because of its previous use in connection

(Testimony of Ralph W. Lawlor.)

with this case. I intend now to make my offer by question and answer form.

Mr. Priest: If I may attempt a clarification, Mr. Slaff, you do not object to the competency as such, of the data contained in this manual?

Mr. Slaff: Well, I don't think so.

The Trial Examiner: What you have in mind is a proposal to read some portion of this into the record from the mouth of the witness, is that the idea, counsel?

Mr. Barber: That is correct, if the Examiner please. It has previously been testified that the common stock of Northwestern Electric Company was listed upon the San Francisco Stock Exchange, and certain prices were introduced in evidence with respect to the early years. I will ask you, Mr. Lawlor, if Walker's Manual shows the prices of Northwestern Electric Company's common stock upon the San Francisco Stock Exchange for the year 1925? A. Yes, it does.

Q. I will ask you to read into the record the quotations of market prices which are there shown, giving the month, the low for each month and the high for each month as shown in that Manual.

Mr. Slaff: I object to that, if it please your Honor, and to make my position perfectly clear, not to the competency [1281] of the proof but to its relevancy and materiality in this proceeding. The stock market prices of this stock as of 1925 have nothing whatever to do with this rehearing.

Mr. Barber: I may say——

(Testimony of Ralph W. Lawlor.)

The Trial Examiner: I think the relevancy of it is very slight. However, it might have some value upon the one question which is incidentally raised as in all cases of this kind, as to the matter of confiscation. So we will permit it and in considering it later give it what weight, if any, it may have.

Mr. Slaff: Well, then, our position, as I have said before today, we are not disputing the fact that American Power & Light paid some five million dollars for this stock as shown in Mr. Parkhursts'-exhibit. We are not disputing the fact that in their minds they must have had some reason, what presumably appeared to them to be good reasons, for paying those dollars to the persons from whom they bought the stock.

But this hearing has been limited by the Commission, to the sole purpose of permitting the company to present a plan for disposition of the three and a half million dollars found by the Commission to be a write-up. Now, even if in the company's views a plan of disposition embraces or comprehends a plan of retention, nevertheless the evidence or alleged evidences of value as of 1925, it seems to me, can't at all [1282] be material, and that is the Commission's counsel's position on that point.

Mr. Barber: May I add, if the Examiner please, to be sure of our position being clearly stated, that this is not offered to show present value with respect to the issue or retention or disposition, but it is offered because as the record already discloses,

(Testimony of Ralph W. Lawlor.)

the American Company asserts that its present rights in this proceeding are to be determined by matters of law as well as matters of accounting, and that it bears upon American's acquisition and its purchase for value.

The Trial Examiner: I think the question has already been passed on, and the statement will be admitted for what it may be worth.

Mr. Barber: Will you read the last question, please?

(Question read, as follows: "I will ask you to read into the record the quotation of market prices which are there shown, giving the month, the low for each month and the high for each month as shown in that Manual.")

A. Reading from Walker's Manual, page 725, headed "Range of Sales at the San Francisco Stock and Bond Exchange for the Year 1925", under the month of January, Northwestern Electric Company common stock is shown as 32½ low, 34 high. [1283]

In the month of February, 33 low, 47⅞ high.

In the month of March, 47¾ low, 47¾ high.

Mr. Barber: I think that is all of this witness.

Mr. Slaff: I still don't think I will have any questions of this witness, but I should like to reserve the right until we are all through here.

Q. (By the Trial Examiner) At the present time this man Smiley is an officer of the American Power & Light Company. What office does he hold?

(Testimony of Ralph W. Lawlor.)

A. I am not personally acquainted with the officers of the company.

Mr. Priest: I know of my own personal knowledge, and I will be sworn if you would like to have me, that Mr. Smiley was at the time an employe of American Power & Light Company and was acting solely as its nominee, having no rights himself in the stock in question.

JOHN A. LAING,

called as a witness on behalf of the American Power & Light Company, being first duly sworn, testified as follows:

Direct Examination

By Mr. Priest:

Q. Will you please state your name and place of residence? [1284]

A. John A. Laing, L-a-i-n-g; Portland, Oregon, 12526 SW Edgecliff Road.

Q. You are a practicing lawyer in the state of Oregon, are you not, Mr. Laing?

A. Yes, I am.

Q. And have been since what date?

A. Since early in the year 1911.

Q. What, if any, position do you hold with Northwestern Electric Company?

A. I have been a vice-president, the vice-presi-

(Testimony of John A. Laing.)

dent as we have only one, and a director or trustee of Northwestern since March of 1925. I have also served in association with Mr. Henry S. Gray, as the company's attorney and counsel since that time.

Q. Mr. Laing, were you counsel of record in the case of Allen, et al. against Northwestern Electric Company, et al., in the Superior Court of the State of Washington in and for Clark County, in which the final decree was entered in September, 1936?

A. Mr. Gray and I appeared as attorneys for Northwestern Electric Company in that suit. That suit involved both the Northwestern Electric Company and American Power & Light Company. We did not appear for the American Power & Light Company.

Q. Please state generally what the nature of that case was? [1285]

A. Well, that was a suit brought by Elmer B. Allen and six or seven other plaintiffs in their capacity as holders of the preferred stock of Northwestern Electric Company against the Northwestern Electric Company and the American Power & Light Company as defendants.

The purposes and objectives of the suit are set forth in some detail in their second amended complaint. Speaking in general terms the suit was aimed to compel the American Power & Light Company, as the then holder of 100,000 shares of the common stock of the Northwestern Electric Com-

(Testimony of John A. Laing.)

pany to pay to the treasury of the Northwestern Electric Company $10,000,000 for that stock, upon the avowed ground that the stock had never been paid for and the American Company purchased and acquired the stock with knowledge that the stock had not been paid for, the stock in the hands of the American Company was not validly issued or outstanding and there were a number of other allegations in the complaint and prayers for relief, some of which were wholly inconsistent with each other, but generally speaking it was an attack upon the validity and status of the common stock in the hands of the American Power & Light Company which had acquired it some eight or nine years previously.

The suit was filed, I think, some time in the summer of 1934, and there were a great many preliminary motions and arguments and discussions in the case, so that the case [1286] finally got down to what you might call brass tacks on the basis of the second amended complaint which was verified in behalf of the parties on May 1, 1936. The suit was in the name of these particular preferred stockholders who held a relatively small amount of stock, but was avowedly a stockholders suit on behalf of all of the preferred stockholders of the company.

Q. Mr. Laing, are you familiar with what I think you have just referred to as to the brass tack or definitive pleadings in this case of Allen against Northwestern Electric Company, et al?

(Testimony of John A. Laing.)

A. I am; yes, sir.

(American Power & Light Company's Exhibit No. 89 was marked for identification.)

Q. Mr. Laing, I hand you herewith a document which has been marked Exhibit No. 89 for identification. Will you please identify this document?

A. Exhibit No. 89 for identification comprises a number of documents under a single binding, with which is attached the certificate of the Clerk of the Superior Court for Clark County, Washington, certifying to the effect she has compared the papers, to which the certificate was attached with the original of the following documents: The second amended complaint, the answer of the Northwestern Electric Company to the second amended complaint, the answer of the [1287] American Power & Light Company to the second amended complaint; 4, a stipulation which will appear from the papers as a stipulation that was signed under date of August 18, 1936; 5, a certificate of the secretary of Northwestern Electric Company which it appears from the compilation was verified on the 17th day of September, 1936, and certified as to the performance and compliance with the conditions that are set out in the stipulation; and 6, the final decree which, as the compilation shows, was signed in open court on September 17, 1936.

(Testimony of John A. Laing.)

Q. Will you please read into the record paragraph No. 1 of the final decree?

Mr. Slaff: Now, if it please the Examiner, I object to any of this going into evidence because it is thoroughly immaterial to this proceeding. The witness has testified that this is a suit by individual preferred stockholders and whatever they may have purported to be and whom they may have purported to represent, I don't see that the proceeding there would have any materiality to this rehearing.

Mr. Priest: It is the position of the American Power & Light Company that this proceeding, among other things, has the effect of casting a cloud upon the title of American Power & Light Company to the 100,000 shares of the common stock of the Northwestern Electric Company which it owns. And it has the effect of questioning the validity of the issuance and of present character of the 100,000 shares of the stock of North- [1288] western Electric Company presently outstanding and in the hands of American Power & Light Company.

And we propose to prove by the testimony of Mr. Laing in this connection that the rights of American Power & Light Company, as the holder of 100,000 shares of fully-paid non-assessable and validly-issued common stock of the Northwestern Electric Company, have been determined by the appropriate authorities of the state of Washing-

(Testimony of John A. Laing.)

ton, which is the state. I think it is already shown in the record, which is the state in which Northwestern Electric Company was organized. That is that company's state of incorporation. [1289]

Mr. Slaff: Now, if it please Your Honor I think counsel's statement bears out exactly what I have said, that this has no materiality here in this proceeding for the reasons which he advances for the offer. There is no cloud being cast upon the title of the American Power & Light Company as to the shares of stock which they own, nor is the validity of their acquisition of those shares, or the validity of their ownership of those shares, here in question. All that is in question here, all that was raised by the original proceeding here was whether or not the three and a half million dollars involved represents a write-up on the books of the company. It has been determined by the Commission that that item on the books of the company is a write-up. The only problem involved is: How shall that write-up be handled? We are not here, as I said, questioning their right to the ownership of this stock, or their title to that stock.

Clearly, as I say, from what counsel has said as to the purpose of this offer, it just doesn't have any place here in this rehearing.

The Trial Examiner: We will permit the exhibit to go in for what it is worth.

Mr. Priest: I have not offered it yet, Your Honor. I merely asked Mr. Laing to read, which

(Testimony of John A. Laing.)

has the same effect of course, as making an offer,—I asked Mr. Laing to read Paragraph No. 1 of the final decree. [1290]

The Trial Examiner: I would suggest that we dispose of the question at once and get it out of the way, rather than go into it twice.

Mr. Priest: We propose to offer it. I wish to have that particular paragraph read into the record as containing the decree, the determination of the Superior Court of the State of Washington, in and for Clark County in this particular matter. I think that that perhaps is the most significant paragraph in the entire exhibit, and I would like to have that read into the record.

The Trial Examiner: Do I understand that you do not propose to offer the rest of it in evidence?

Mr. Priest: We do intend to offer it in evidence and I will offer it first if that is what your Honor would prefer.

Mr. Slaff: I have stated my objection.

The Trial Examiner: Objection overruled.

Mr. Priest: If Your Honor please, I will offer in evidence the document marked Exhibit 89 for Identification.

The Trial Examiner: The exhibit will be admitted in evidence.

(American Power & Light Company's Exhibit No. 89 received in evidence.)

(Testimony of John A. Laing.)

EXHIBIT 89

In the Superior Court of Washington in and for Clark County

No. 14,838

ELMER B. ALLEN, FRED BROOK, JOHN D. CARY, H. P. HANSEN, RITA HANSEN, MARTIN LUNDEEN, ELLEN LUNDEEN, and ANDREW GEO. STENHOUSE, a minor, by his guardian GRACE STENHOUSE,

Plaintiffs,

vs.

NORTHWESTERN ELECTRIC COMPANY, a corporation, and AMERICAN POWER AND LIGHT COMPANY, a corporation,

Defendants.

SECOND AMENDED COMPLAINT

Come now the plaintiffs and file this, their second amended complaint, without waiving their right to plead, and insisting upon their right to plead, the several matters and things alleged in the original complaint, and in their first amended complaint, which were stricken by order of the court, and which the trial court will not permit to be alleged in the amended complaint under penalty of dismissal of the action, and for their said second amended complaint they severally allege:

(Testimony of John A. Laing.)

Exhibit No. 89—(Cont.)

I.

That defendant Northwestern Electric Company was duly organized as a corporation on or about January 7, 1911, under and by virtue of the laws of the State of Washington and since that time was, and now is, a corporation organized under the laws of said state. At all times since its incorporation, the said defendant has owned and operated, and now owns and operates, properties in the Counties of Klickitat, Skamania and Clark in the State of Washington and Multnomah County in the State of Oregon for the generation and distribution of electricity, and in Multnomah County, Oregon, for the generation and distribution of steam for heating purposes. Said corporation is qualified for the transaction of business in the State of Oregon. It is not engaged in the transaction of business, has not qualified for the transaction of business, and is not subject to the process of jurisdiction of the courts of any States other than Oregon and Washington.

II.

American Power and Light Company is, and during all of the times herein mentioned was, a corporation duly created, organized and existing under and by virtue of the laws of the State of Maine.

(Testimony of John A. Laing.)

Exhibit No. 89—(Cont.)

III.

Defendant Northwestern Electric Company was incorporated with an authorized capital stock, as fixed by its articles of incorporation, of $5,000,000.00, divided into 50,000 shares of common stock of the par value of $100.00 each. All of said common stock was issued on or about July 7, 1911, and has at all times been outstanding since said time. Neither at that time, theretofore nor thereafter was there paid to said defendant Northwestern Electric Company directly or indirectly in money, property, services, or otherwise, any consideration for said common stock so issued, nor did said corporation at any time receive any consideration therefor.

IV.

On or about the 14th day of August, 1911, defendant Northwestern Electric Company, by proceedings appropriate to that end taken in the form of law, authorized the increase, and did increase the capital stock of said defendant by an additional $5,000,000.00 of common stock divided into 50,000 shares each of the par value of $100.00, thus making the total capital stock of said corporation, when said increase became effective, $10,000,000.00 par value of common stock.

(Testimony of John A. Laing.)

Exhibit No. 89—(Cont.)

V.

Certificate of such increase was filed in the office of the secretary of State for the State of Washington, July 23, 1912, and said certificate was verified by the proper officers of Northwestern Electric Company, who on oath stated, inter alia, that the amount of the common capital stock of Northwestern Electric Company actually paid for at and prior to the time of such certificate of increase was filed, was $5,000,000.00, whereas, in truth, no part of the said original issue of $5,000,000.00 of common capital stock authorized, subscribed for and issued, had been paid for either in whole or in part. Shortly after July 23, 1912, and during said year, all of the increase in the capital stock of said corporation was issued and has been outstanding ever since that time. Said increase of common stock was issued without consideration in money, property, services or otherwise, either before, after, or at the time of the issuance thereof. From the time said Northwestern Electric Company was organized until sometime in 1924, when American Power and Light Company obtained control of said Northwestern Electric Company thru acquisition of said $10,000,000.00 par value of common stock, the persons owning and controlling said original issue of $5,000,000.00 of common stock, and

(Testimony of John A. Laing.)

Exhibit No. 89—(Cont.)

said increase of $5,000,000.00 of common stock, were at all times in complete control of the corporation and of its affairs, elected the trustees, directed and dictated who should be elected as officers and employees of the corporation. During all of said times, no call or demand was made by the corporation upon the holders of said original issue of common stock, or of said increased issue of common stock, to pay for the same or any part of the par value thereof, by said corporation thru its stockholders, board of trustees, officers, or otherwise, for that the holders of all of said common stock who owed said corporation for the same, controlled and dominated the affairs of the corporation as aforesaid, and would not and did not authorize or permit any call or demand for payment of such stock to be made upon them by or in behalf of said corporation, which they thus dominated and controlled.

VI.

In the latter part of 1924, or the early part of 1925, the American Power and Light Company, with full knowledge of all the foregoing facts, and that said original $5,000,000.00 of common stock, and also said increase of $5,000,000.00 of common stock, and each and every share of each

(Testimony of John A. Laing.)

Exhibit No. 89—(Cont.)

thereof, had been issued wholly without consideration of any kind, and that said stock was void and invalid, for the purpose of acquiring control of Northwestern Electric Company, acquired said $10,000,000.00 of common stock and since the date of the acquisition thereof, said American Power and Light Company through and by virtue of the ownership of said stock, has wholly controlled and dominated all of the corporate activities and business of every kind of the said Northwestern Electric Company and still so controls and dominates it. At no time since American Power and Light Company obtained control of Northwestern Electric Company thru the acquisition of said stock, has any call or demand been made upon it, or upon any one else to pay for said stock or any part thereof, for that American Power and Light Company would not authorize, or permit, Northwestern Electric Company to make any call or demand for payment of such stock to be made upon American Power and Light Company or upon anyone else, as, in practical effect, if any such call or demand has been made, it would have been made by American Power and Light Company upon itself.

VII.

That said original issue of 50,000 shares of common stock, and also the increase of 50,000 shares

Exhibit No. 89—(Cont.)

of common stock, each share of the par value of $100.00, was fraudulently issued and reissued, and is now held by American Power and Light Company, or for and by it in the name of another.

VIII.

About April 8, 1914, the articles of incorporation of Northwestern Electric Company were amended to authorize the issuance of $2,000,000.00 of 6% preferred stock consisting of 20,000 shares of the par value of $100.00 each. The certificate of increase, verified by oath of the proper officers of said company, and filed in Washington and certified copy thereof filed in Oregon, recited that the amount actually paid in on capital stock was $10,000,000.00, when in fact nothing had been paid. Said preferred stock was issued and sold to the general investing public for cash at substantially its par value. About June 6th, 1921, the articles of incorporation of said defendant were again amended to authorize the issuance of $10,000,000.00 of 7% preferred stock consisting of 100,000 shares each of the par value of $100.00. Said 7% preferred stock was offered for sale and sold to the general investing public for cash at or in excess of its par value. When the articles of incorporation were amended, as above stated, to provide for $2,000,000.00 par value 6% preferred stock and

(Testimony of John A. Laing.)

Exhibit No. 89—(Cont.)

$10,000,000.00 par value 7% preferred stock, the authorized capital stock of said defendant Northwestern Electric Company was made to be $22,000,000.00 par value. In the articles of incorporation of said defendant as amended on or about June 6th, 1921, provision was made for the exchange of outstanding 6% preferred stock previously sold to and held by the investing public, for said 7% preferred stock on the basis of nine-tenths of one share of 7% preferred stock for one share of 6% preferred stock. Practically all of the holders of 6% preferred stock outstanding at the time said 7% preferred stock was authorized exchanged their 6% preferred stock for 7% preferred stock on the basis stated. There is now outstanding in the hands of the general investing public preferred stock of said defendant of the par value of about $4,900,000.00, of which less than $100,000.00 is 6% preferred stock and the balance is 7% preferred stock, and of the total amount of preferred stock so outstanding, less than 400 shares is owned by either of the defendants, their subsidiaries or affiliate corporations. The balance is owned and held by the general investing public.

IX.

Under the laws of the State of Washington, Northwestern Electric Company and the trustees

(Testimony of John A. Laing.)

Exhibit No. 89—(Cont.)

and officers thereof, for more than twenty years last past were, and still are, required to make an annual report, now made to the Department of Public Works, and theretofore to the officer exercising like power. These reports were and are required to show and recite, among other things, under oath, the capital stock outstanding of the corporation, the amount of its investment in fixed capital, its investment in plants and equipments, materials, work under construction, and other items. In each annual report filed in the State of Washington by the corporation, and which was open to public inspection and intended for public inspection, it was recited and represented that the investment in plant and equipment was in a stated amount, which always was in truth and in fact $10,000,000.00 in excess of the actual investment in plant and equipment. In other words, a fraudulent and fictitious item of $10,000,000.00 was carried into plant and equipment as an offset or balancing item for the $10,000,000.00 common stock shown among the liabilities of the corporation. Under the laws of Oregon a like report is required annually from the corporation, which is open to and intended for public inspection, and the annual report so filed with the Public Service Commission, and its successor in office, the Public

(Testimony of John A. Laing.)

Exhibit No. 89—(Cont.)

Utilities Commission, contained the same false and fictitious item of $10,000,000.00 carried in plant and equipment. Every balance sheet and financial statement which the Northwestern Electric Company has issued since 1914, during which time it has issued and circulated among the investing public, has contained the false and fictitious item of $10,000,000.00 as representing an investment in plant and equipment in excess of the amount actually invested. Each year for more than fifteen years last past, the Northwestern Electric Company has furnished to standard statistical publications, such as Moody's Manual, and Poor's Manual, resorted to generally by the investing public, financial statements intended for publication, and which were published as guides and sources of reliable information to investors generally, showing as invested in plant and equipment $10,000,000.00 in excess of that actually invested. During all of the time that the Northwestern Electric Company was engaged in the sale of its preferred stock to plaintiffs and others it made use of printed financial statements, balance sheets, and prospectuses which it exhibited to prospective investors including plaintiffs as representing the true financial condition of the company and the true amount of the investment in its properties, and in all of these statements, balance sheets, prospec-

(Testimony of John A. Laing.)

Exhibit No. 89—(Cont.)

tuses and other written material used and distributed by the Northwestern Electric Company it was stated and represented that the company had an investment in plant and equipment of a certain amount which was always $10,000,000.00 in excess of the actual investments therein; and always represented in its books, balance sheets, financial statements, prospectuses, annual reports to the authorities in the State of Washington and the State of Oregon, statistical publications, and otherwise, that the 100,000 shares of common stock issued in 1911 and 1912 as aforesaid had been fully paid for, and that the moneys received therefor had gone into plant and equipment, all of which was untrue and known to be untrue by the Northwestern Electric Company, its trustees and officers, at all times, and by American Power and Light Company, its officers and trustees. That after the acquisition of the said one hundred thousand shares of common stock by American Power and Light Company in the latter part of 1924 or the early part of 1925, financial statements, balance sheets and prospectuses of the character hereinbefore described were issued and circulated to statistical publications, holders of preferred stock of the Northwestern Electric Company, prospective investors in preferred stock of said corporation, in-

(Testimony of John A. Laing.)

Exhibit No. 89—(Cont.)

cluding the plaintiffs, and to the public generally, with the full knowledge, consent and under the direction of the American Power and Light Company, and ever since said corporation acquired control as aforesaid of Northwestern Electric Company there have been many financial statements and balance sheets issued by Northwestern Electric Company and information furnished to statistical publications of the character aforesaid, and statements issued to holders and prospective investors in the preferred stock of Northwestern Electric Company, and financial statements issued by the American Power and Light Company, and in all of them it was, in substance and effect, stated and represented that said 100,000 shares of common stock were fully paid for and the proceeds thereof invested in the plant and equipment of the Northwestern Electric Company, all of which was done with the full knowledge and consent and under the control and direction of the American Power and Light Company.

X.

The investors in said preferred stock, including each of the plaintiffs, had no knowledge or information that the said original issue of $5,000,000.00 par value of common stock and said increase of said $5,000,000.00 par value of said common stock had

Exhibit No. 89—(Cont.)

been without consideration and that no payment had been made therefor and no call made for the payment therefor, or any part thereof or that said stock was issued without any valuable or other consideration and had not been paid for in whole or in part until within one month next prior to the filing of the original complaint, when, for the first time, the plaintiffs severally learned the true facts as hereinbefore stated. The said financial statements, balance sheets, prospectuses, annual reports, and other statistical data and information made, published and circulated as aforesaid by defendant Northwestern Electric Company were made, issued and circulated for the purpose of leading the investing public including the plaintiffs, to believe, and they did believe, that said common stock had been fully paid for and the proceeds thereof invested in the plant of said Northwestern Electric Company. Each of the plaintiffs, in reliance thereof, invested in the preferred stock of said defendant as hereinafter alleged. That by reason of the aforesaid matters and things and as a result thereof, the defendants deliberately and continuously concealed from the plaintiffs and from the investors in the preferred stock of defendant Northwestern Electric Company the fact that said common stock had not been paid for and deliberately and continuously represented to and led the plaintiff and the

(Testimony of John A. Laing.)

Exhibit No. 89—(Cont.)

investors generally in said preferred stock to believe that said common stock had been fully paid for and the proceeds thereof invested in the plant of the Northwestern Electric Company. That there are no unprotected or intervening rights of third parties and the defendants have been in nowise prejudiced or harmed in delay in bringing this suit.

XI.

Dividends on the preferred stock of Northwestern Electric Company are payable quarterly. Dividends on said preferred stock in 1933, and against in 1934, were passed and not paid, the corporation and its officers and trustees giving as a reason therefor that no funds were available for the purpose.

XII.

That the officers and trustees of the Northwestern Electric Company have made no call or demand upon American Power and Light Company to pay for said common stock, or any part thereof, or to surrender and cancel the same, or any part thereof, and the said officers and trustees of Northwestern Electric Company will not make any such demand and will not take any steps or proceedings to protect, preserve or enforce the rights of the Northwestern Electric Company with respect to any

Exhibit No. 89—(Cont.)

of such matters, for that they are the mere creatures of American Power and Light Company, are completely under the control and domination of said American Power and Light Company, which will not authorize or permit them to make any demand or bring or prosecute any action, suit, or proceeding for the protection, preservation or enforcement of the rights of Northwestern Electric Company with respect to any of the said matters.

XIII.

As the result of the failure of the officers and trustees of Northwestern Electric Company to protect and enforce the rights of the corporation with respect to the matters aforesaid and with respect to other matters hereinafter set forth, the said corporation has borrowed large sums from American Power and Light Company on open account, upon which it is paying interest, and which it has not the funds to repay; it has passed the dividends on the preferred stock in 1933, and again in 1934; and it is not making provision for the retirement of any of its bonded indebtedness, and has no funds with which to carry on needed improvements, extensions and betterments. As a result, the preferred stock of the corporation, which was sold to the plaintiffs and to the investing public generally at par or higher, is now quoted on the market at

(Testimony of John A. Laing.)

Exhibit No. 89—(Cont.)

about thirteen cents on the dollar, and the bonds of the corporation, which were sold at par or better, are now quoted on the market at about fifty-seven cents on the dollar.

XIV.

The management of Northwestern Electric Company is now wholly in the interest of American Power and Light Company; that without the aid of the court, these plaintiffs have no means of causing a demand by said Northwestern Electric Company for said cancellation of said 100,000 shares of common stock.

XV.

That the trustees of Northwestern Electric Company participated and assisted in all of the acts complained of herein. That with respect to all such matters the Northwestern Electric Company and its trustees have acted and cooperated with American Power and Light Company and will continue so to do and have wholly aligned themselves with said American Power and Light Company and will continue so to do. That by reason of all of the facts herein alleged it would be useless to make demand upon said Northwestern Electric Company or upon its board of trustees to cancel or cause the cancellation of any of said 100,000 shares of common stock or to collect or attempt the

Exhibit No. 89—(Cont.)

collection of illegal dividends paid thereon or the cancellation of the said dividend notes, or any thereof, or to secure or attempt to secure, or prosecute any suit or action for any of the relief herein sought.

XVI.

That the plaintiff, Elmer B. Allen, on October 16, 1925, purchased from Northwestern Electric Company ten shares of said 7% preferred stock for which was issued to him Certificate No. 8487 of Northwestern Electric Company, and on March 21, 1930, purchased ten additional shares from said company of said 7% preferred stock for which was issued to him certificate No. 13352. That said stock was purchased at a price in excess of $100.00 per share. That ever since said purchases said plaintiff has been the owner and holder of said shares of stock and said certificates.

That about October 1, 1925, the plaintiff Fred Brook purchased from said Northwestern Electric Company ten shares of said 7% preferred stock at the price of $105.00 per share for which certificate was issued to him and that ever since said purchase said plaintiff was, and now is, the owner and holder of said shares and the certificate therefor.

That on or about April 20, 1931, the plaintiff John D. Carey, purchased from Northwestern Elec-

(Testimony of John A. Laing.)

Exhibit No. 89—(Cont.)

tric Company ten shares of said 7% preferred stock at the price of $102.00 a share and there was issued to him for said shares certificate No. 14,151. Ever since said purchase said plaintiff was, and now is, the owner and holder of said shares and the said certificate.

That on or about October 26, 1926, the plaintiffs H. P. Hanson and Rita Hanson, father and daughter, purchased from Northwestern Electric Company five shares of said 7% preferred stock at a price exceeding $100.00 per share, for which was issued to them certificate No. 9777. That on or about October 7, 1926, the said plaintiffs purchased from Northwestern Electric Company ten shares of said 7% preferred stock at a price exceeding $100.00 a share, for which was issued to them certificate No. 9737. Ever since said purchase said plaintiffs were and now are the owners and holders of said shares and all of said certificates.

That the plaintiffs, Martin and Ellen Lundeen, who are husband and wife, made the following purchases from Northwestern Electric Company of said 7% preferred stock, on or about the following dates, at prices exceeding $100.00 a share, for which the following certificates were issued, to-wit:

On or about August 16, 1921, two shares, for which was issued to them certificate No. 116;

(Testimony of John A. Laing.)

Exhibit No. 89—(Cont.)

On or about October 11, 1921, two shares, for which was issued to them Certificate No. 165;

On or about March 21st, 1923, one share, or which was issued to them certificate No. 2595;

On or about August 15, 1923, three shares, for which was issued to them certificate No. 3270;

On or about January 2, 1924, two shares, for which was issued to them certificate No. 3773;

On or about January 8, 1924, one share, for which was issued to them certificate No. 3813;

On or about January 5, 1925, three shares for which was issued to them certificate No. 6204

Ever since said respective purchases, said plaintiffs have been and now are the owners and holders of said shares and of said certificates. Additionally, said plaintiffs, as Trustee for Ellis Mills, purchased from Northwestern Electric Company on or about November 18, 1926, five shares of said 7% preferred stock for a price exceeding $500.00, for which was issued to them certificate No. 9827. Ever since said purchase the said plaintiffs as such trustees have owned and held said shares and said certificates.

On or about August 7, 1931, the plaintiff Andrew Geo. Stenhouse, a minor, thru his guardian Grace Stenhouse, purchased from Northwestern Electric Company ten shares of said 7% preferred stock at a price of $101.00 a share, for which certificate

(Testimony of John A. Laing.)

Exhibit No. 89—(Cont.)

No. 14326 was issued and ever since said purchase the said minor thru his said guardian was, and now is, the owner and holder of said shares and of said certificate.

XVII.

That plaintiffs bring this action for and in behalf of themselves as stockholders of defendant Northwestern Electric Company and all other stockholders of said company similarly situate who wish to join herein and in behalf of said defendant Northwestern Electric Company. That the number of said stockholders similarly situated is not known to plaintiffs, but is large, probably several thousand.

XVIII.

That practically all of the said original issue of 50,000 shares of common stock of defendant Northwestern Electric Company and of said increase of 50,000 shares of common stock of said company were issued to Herbert Fleishhacker and Mortimer Fleishhacker or in the names of others for them and for their use and benefit. That said Herbert Fleishhacker and Mortimer Fleishhacker are residents of California and not within the jurisdiction of this court. That the principal office and place of business of defendant Northwestern Electric Company is in Vancouver, Clark County, Wash-

(Testimony of John A. Laing.)

Exhibit No. 89—(Cont.)

ington, where, under the by-laws of said corporation, are held the meetings of its stockholders.

Wherefore plaintiffs, in their own behalf, in behalf of all other stockholders of the Northwestern Electric Company similarly situated and in behalf of said Northwestern Electric Company, pray decree by this court:

First: That the defendants and each of them be required to disclose, make discovery, allow plaintiffs to inspect, and produce at the trial the following: All corporate records, books of account, and files, having to do with, concerning, or relating to the original issue, and their claim of payment of the original issue of 50,000 shares of common stock, and the increased original issue of 50,000 shares of common stock, *or* Northwestern Electric Company, all original books of entry and account showing the payment or non-payment for all of said stock; stock ledger and stock register of Northwestern Electric Company, showing the issuance of said stock, to whom issued, the date thereof, and all facts and circumstances relative thereto; the books of entry and account showing original plant and equipment account, and additions thereto; the books of entry and account showing the dividend payments and dividend notes executed by Northwestern Electric Company; all rec-

(Testimony of John A. Laing.)

Exhibit No. 89—(Cont.)

ords showing the issuance of preferred stock of Northwestern Electric Company; the price received therefor, and the persons to whom issued; and the debit and credit accounts of Northwestern Electric Company of and with American Power and Light Company.

Second: That the stock and certificates representing the 50,000 shares of the original issue of common stock, each share of the par value of $100.00, now held by, or for the account of, American Power and Light Company, be adjudged void, invalid, cancelled, and the capital structure of Northwestern Electric Company be correspondingly reduced, or

Third: That American Power and Light Company be held to pay to Northwestern Electric Company, and that Northwestern Electric Company be required to collect from American Power and Light Company for said stock at par value thereof, to-wit: $5,000,000.00, together with interest at the legal rate thereon from the date said stock was issued to, in the name of, or for the account of American Power and Light Company.

Fourth: That said increase of 50,000 shares of common stock of Northwestern Electric Company, each share of the par value of $100, be adjudged void, invalid, and cancelled, or American Power

(Testimony of John A. Laing.)

Exhibit No. 89—(Cont.)

and Light Company be requested to pay the full par value to Northwestern Electric Company.

Fifth. That all dividends paid upon each of said issues of common stock be adjudged illegally paid, and that American Power and Light Company be required to pay unto Northwestern Electric Company, and said Northwestern Electric Company be required to collect from American Power and Light Company, each of said dividend payments with interest at the legal rate from the date of payment thereof, and that all dividend notes outstanding thereon held by American Power and Light Company be adjudged invalid, without consideration, and cancelled.

Sixth: That an accounting be had in this action between Northwestern Electric Company and American Power and Light Company, to determine the amount, extent, and validity of all debts, dues, claims, or demands held or claimed by American Power and Light Company against Northwestern Electric Company, and the amount adjudged to be owing to American Power and Light Company be set off against all payments made as dividends upon the common stock and against any sums adjudged to be due Northwestern Electric Company for said common stock.

Seventh: That until the final determination of

(Testimony of John A. Laing.)

Exhibit No. 89—(Cont.)

this suit, Northwestern Electric Company, its trustees and officers, be enjoined and restrained from recognizing the validity of said common stock or the right of American Power and Light Company to vote the same at any stockholders' meeting and that American Power and Light Company be enjoined and restrained from voting said common stock at any stockholders' meeting of Northwestern Electric Company.

Eighth: That a receiver be appointed of Northwestern Electric Company, and its properties, to carry on and conduct its business, to require an accounting of and account with American Power and Light Company, in respect to all matters herein set forth and to prosecute any and all necessary suits, actions and proceedings for any or all relief herein sought and to preserve, protect and assert all and singular the rights of defendant Northwestern Electric Company in respect of all the matters and things set forth in this complaint.

Ninth: That a proper allowance be made herein unto the plaintiffs, and the class represented by them, to-wit, the preferred stockholders of Northwestern Electric Company, for counsel and attorneys' fees, and the expenses of this litigation.

Tenth: For such other and further relief to which plaintiffs and/or other stockholders of de-

(Testimony of John A. Laing.)

Exhibit No. 89—(Cont.)

fendant Northwestern Electric Company similarly situated and/or said defendant Northwestern Electric Company may be entitled including the costs and disbursements of this suit.

W. H. Abel
Office and Post Office Address:
Montesano, Washington

CLARK & CLARK
Office and Post Office Address:
Yeon Building, Portland, Oregon

CHAS. M. THOMAS
Office and Post Office Address:
Pacific Bldg., Portland. Oregon.

D. ELWOOD CAPLES
Office and Post Office Address:
Arts Building, Vancouver. Washington.

State of Washington
County of Clark—ss.

Elmer B. Allen, being first duly sworn, on oath deposes and says: That he is one of the plaintiffs in

(Testimony of John A. Laing.)

Exhibit No. 89—(Cont.)

the above entitled action and makes this verification on behalf of the plaintiffs, having authority so to do; that he has read the foregoing first amended complaint, knows the contents thereof, and believes the same to be true.

ELMER B. ALLEN.

Subscribed and Sworn to before me this 1st day of May, 1936.

D. ELWOOD CAPLES,

Notary Public in and for the State of Washington, residing at Vancouver.

My commission expires: June 5th, 1939.

A true copy:

(Sgd) D. ELWOOD CAPLES
Of Plaintiffs' Attorneys.

[Title of Superior Court and Cause.]

ANSWER OF AMERICAN POWER & LIGHT COMPANY TO SECOND AMENDED COMPLAINT

Comes now the defendant, American Power & Light Company, a corporation, and not waiving, but expressly relying upon, its special appearance and objection to the jurisdiction of this court over it, and not subjecting itself to such jurisdiction, but appearing specially and only for the purpose of protecting and defending its interest in and its title to

Exhibit No. 89—(Cont.)

such shares of the common capital stock of the defendant, Northwestern Electric Company, as may now stand in the name of or be held by or on behalf of said American Power & Light Company, and in so doing relying upon the order of this court heretofore entered herein on January 28, 1935, granting said defendant leave and authorizing it to appear specially for the sole purpose of protecting and defending its interest in and its title to said common capital stock in any manner whatever without thereby acknowledging, creating or conferring any jurisdiction in the above entitled court over the person of said defendant or entitling the plaintiff herein, if successful, to a personal judgment or other relief in personam against said defendant, and for its answer to the plaintiffs' second amended complaint, admits, denies and alleges as follows, to-wit:

I.

It admits the allegations of paragraph I thereof.

II.

It admits the allegations of paragraph II thereof, except that the true name of this defendant is "American Power & Light Company."

III.

Answering paragraph III, it admits that the de-

(Testimony of John A. Laing.)

Exhibit No. 89—(Cont.)

fendant, Northwestern Electric Company, was incorporated with an authorized capital stock of $5,000,000, divided into 50,000 shares of common stock with a par value of $100 each, but denies that all of said stock was issued on or about July 7, 1911, alleging the fact to be that all thereof was actually or constructively issued in March of 1911 notwithstanding that certificates evidencing three separate shares were not formally issued until August 18, 1911; admits that all of said stock has been outstanding at all times since August 18, 1911 and denies each and every other allegation in said paragraph contained.

IV.

It admits the allegations of paragraph IV thereof, except that it denies that the increase of the capital stock therein alleged occurred on or about August 14, 1911, and alleges that such increase was authorized and made on or about May 14, 1912.

V.

Answering paragraph V, this defendant admits that a duly verified certificate of the increase of the common capital stock of the Northwestern Electric Company was filed in the office of the Secretary of State of the State of Washington July 23, 1912, and that in such certificate it was stated that the amount of the common capital

(Testimony of John A. Laing.)

Exhibit No. 89—(Cont.)

stock of the Northwestern Electric Company actually paid for, at and prior to the time such certificate of increase was filed, was $5,000,000, and that ever since July 23, 1912, defendant Northwestern Electric Company has had issued and outstanding 100,000 shares of its common capital stock of the par value of $100 each. It denies that it acquired $10,000,000 of common stock of said Northwestern Electric Company in 1924, but admits that it has heretofore acquired all of said stock, alleging that all of said stock was acquired by the purchase thereof in the open market, in good faith and for value, as hereinafter more particularly alleged, approximately 98% thereof having been so purchased and acquired in February and March of 1925 and all the balance thereof, except 70 shares, from time to time between April 1 and December 31, 1925, and the remaining 70 shares having been so purchased and acquired as follows: 15 shares in February, 1926, 52 shares in December, 1927, and three shares in June, 1930. It denies that the original issue of $5,000,000 of common capital stock was not fully paid for; denies that the increase in said common capital stock was issued without any consideration and denies that by the acquisition of said stock it obtained control of said Northwestern Electric Company, a corporation, or any rights in or power over said Northwestern Electric Company other

(Testimony of John A. Laing.)

Exhibit No. 89—(Cont.)

than the right to vote said stock, share for share, with the outstanding preferred stock at any and all meetings of the stockholders of said Northwestern Electric Company. This defendant denies that any of the remaining allegations of paragraph V of plaintiffs' second amended complaint are in any way material, relevant or germane to the issue as to this defendant's right, title and interest in and to the common stock of Northwestern Electric Company.

Without waiving such claim of immateriality and irrelevancy, but still insisting thereon, and only in the event and to the extent that such remaining allegations or any of them may be held to be material, relevant or germane to such issue and for the purpose of such issue only, this defendant alleges that it does not have information sufficient to form a belief as to any of the allegations of said paragraph V of plaintiffs' second amended complaint other than those hereinbefore specifically admitted or denied, and therefore denies each and every and all of such other allegations.

VI.

Answering paragraph VI thereof, this defendant admits that in February and March of 1925 it acquired by purchase in the open market in good faith and for a valuable consideration, approximately

(Testimony of John A. Laing.)

Exhibit No. 89—(Cont.)

98% of the then authorized common stock of the Northwestern Electric Company; admits that, as hereinbefore more particularly alleged, it has since purchased in the open market, in good faith and for value all of the remaining shares of the authorized common stock of said Northwestern Electric Company, but specifically denies that at the time of the purchase and acquisition of said stock or any of it it knew that said stock or any of it has been issued without consideration or was not fully paid for, if such were the fact, or that said stock or any of it was void or invalid, and specifically denies that said common stock was issued without consideration and that any part of it was or is void or in any way invalid. This defendant denies that any of the remaining allegations of said paragraph VI of the plaintiff's second amended complaint are in any way material, relevant or germane to the issue as to this defendant's right, title and interest in and to the common stock of Northwestern Electric Company. Without waiving such claim of immateriality and irrelevancy, but still insisting thereon, and only in the event and to the extent that such remaining allegations may be held to be material or relevant to such issue and for the purpose of such issue only, this defendant admits that Northwestern Electric Company has made no call or demand upon it as the owner of the common capital stock of said

(Testimony of John A. Laing.)

Exhibit No. 89—(Cont.)

Northwestern Electric Company to pay any part of the par value thereof; denies that since it purchased said stock and became the owner thereof it has wholly controlled and dominated all of the corporate activities and business of said Northwestern Electric Company; denies that it has ever done otherwise than properly and lawfully to exercise its voting rights at stockholders' meetings as the owner and holder of its shares of the common stock of said Northwestern Electric Company, and generally denies each and every other or remaining allegation of said paragraph VI.

VII.

Answering paragraph VII, this defendant admits that the 100,000 shares of the common stock of the Northwestern Electric Company is now held by it or on its behalf, but denies that said stock or any part thereof was fraudulently issued or reissued.

VIII.

Answering paragraph VIII, this defendant admits that on or about April 8, 1914, the Articles of Incorporation of the defendant, Northwestern Electric Company, were amended to authorize the issuance of 20,000 shares of six percent preferred stock of the par value of $100 per share, and that the certificate of such increase filed in the office of the

(Testimony of John A. Laing.)

Exhibit No. 89—(Cont.)

Secretary of State of the State of Washington and certified copy filed in the office of the Corporation Commissioner of the State of Oregon recited that the amount of capital actually paid in at the time of such increase was $10,000,000, but denies that nothing had in fact been paid in or for the $10,000,000 of common stock theretofore issued. This defendant admits that a portion of the six percent preferred stock authorized by the amendment of April 8, 1914, was sold to the general investing public, but denies that it was sold at substantially its par value for as much as said stock was sold in units of one share of said preferred stock and one-half share of the common stock for approximately $90.00 per unit. This defendant further admits that the Articles of Incorporation of said Northwestern Electric Company were again amended on or about October 14, 1920, not June 6, 1921, as alleged in plaintiffs' second amended complaint, to authorize the issuance of 100,000 shares of seven percent first preferred stock of the par value of $100 per share, and that a certificate of such increase was filed in the office of the Secretary of State of the State of Washington, November 4, 1920, which certificate stated, under oath, that the amount of capital stock actually paid in was at that time $11,870,300.00. This defendant admits that by the amendment of October

(Testimony of John A. Laing.)

Exhibit No. 89—(Cont.)

14, 1920, the authorized capital stock of Northwestern Electric Company was made to be $22,000,000 in par value inclusive of the $2,000,000 in par value of six percent preferred stock authorized by the amendment of April 8, 1914; admits that by the amendment of October 14, 1920, provision was made for the exchange of the outstanding six percent preferred stock for seven percent first preferred stock at the rate of nine-tenths of a share of first preferred stock for each share of the original preferred stock, and admits that a large part of the original preferred stock was so exchanged; admits that there is now outstanding $72,900 in par value of the original six percent preferred stock and $4,744,100 in par value of the seven percent first preferred stock, of which, this defendant is informed and therefore alleges the fact to be that the defendant Northwestern Electric Company has reacquired and now owns 326 shares of said seven percent preferred stock; and defendant denies each and every other allegation in said paragraph VIII contained.

IX.

Inasmuch as paragraph IX of the plaintiff's original complaint was not stricken but was allowed to stand only as allegations in support of plaintiffs' standing to maintain this action and not as allegations raising an issue with this defendant upon

(Testimony of John A. Laing.)

Exhibit No. 89—(Cont.)

which any relief against this defendant can be predicated and has been reiterated in plaintiffs' second amended complaint, wherein it appears as paragraph IX, and inasmuch as this defendant is not waiving but is relying upon its special appearance and objection to the jurisdiction of the above named court and is appearing specially for the sole purpose of protecting and defending its interest in and its title to the common capital stock of Northwestern Electric Company, pursuant to the order of said court entered January 28, 1935, this defendant makes no answer to the allegations of said paragraph IX of plaintiffs' second amended complaint, but does not, by its failure to deny the same, admit any allegations of said paragraph IX, nor waive proof of such of said allegations proof of which may be held by the Court essential to enable plaintiffs to maintain this action.

X.

This defendant does not have information sufficient to form a belief as to the allegations of the first sentence of paragraph X of plaintiffs' second amended complaint regarding the knowledge or information possessed by investors in the preferred stock of Northwestern Electric Company, and therefore denies each and all of such allegations. It specifically denies that the common stock of said

(Testimony of John A. Laing.)

Exhibit No. 89—(Cont.)

Northwestern Electric Company was issued without consideration and that no payment had been made therefor. Inasmuch as the balance of paragraph X of palintiffs' second amended complaint, which is identical with and a reiteration of paragraph XII of plaintiffs' original complaint after the first sentence thereof, was not stricken but was allowed to stand only as allegations in support of plaintiffs' standing to maintain this action and not as allegations raising an issue with this defendant upon which any relief against this defendant can be predicated, and inasmuch as this defendant is not waiving but is relying upon its special appearance and objection to the jurisdiction of the above named court, and is appearing specially for the sole purpose of protecting and defending its interest in and its title to the common capital stock of Northwestern Electric Company, pursuant to the order of said Court entered January 28, 1935, this defendant makes no answer to the balance of the allegations of said paragraph X of plaintiffs' second amended complaint, but does not by its failure to deny the same admit any of such remaining allegations of said paragraph X nor waive proof of such of said allegations proof of which may be held by the Court essential to enable plaintiffs to maintain this action.

(Testimony of John A. Laing.)

Exhibit No. 89—(Cont.)

XI.

It admits the allegations of paragraph XI thereof.

XII.

Answering paragraph XII, this defendant denies that any of the allegations in said paragraph XII contained are material, relevant or germane to the issue as to this defendant's right, title and interest in and to the common stock of Northwestern Electric Company. Without waiving such claim of immateriality and irrelevancy, but still insisting thereon, and in the event and to the extent only that such allegations may be held to be material or relevant to such issue and for the purpose of such issue only, admits that no call or demand has been made upon it by or on behalf of Northwestern Electric Company to pay for said common stock or any part thereof or to surrender or cancel the same or any part thereof, and denies each and every other allegation in said paragraph XII contained.

XIII.

Answering paragraph XIII, this defendant denies that any of the allegations in said paragraph XIII contained are material, relevant or germane to the issue as to this defendant's right, title and interest in and to the common stock of the Northwestern Electric Company. Without waiving such

(Testimony of John A. Laing.)

Exhibit No. 89—(Cont.)

claim of immateriality and irrelevancy, but still insisting thereon, and in the event and to the extent only that such allegations may be held to be material or relevant to such issue and for the purpose of such issue only, this defendant admits that said Northwestern Electric Company has borrowed large sums of money from this defendant; that Northwestern Electric Company has passed the dividends on its preferred stock in 1933 and 1934; denies each and every other allegation in said paragraph contained, and further denies that any of the matters and things in said paragraph alleged were the result of the failure of the officers and trustees of Northwestern Electric Company to protect and enforce the rights of that corporation in respect to the common stock of that corporation held by or on behalf of this defendant, and alleges that for upwards of six months last past the bonds of the defendant Northwestern Electric Company have been quoted on the market and are selling above par and its seven percent prefererd stock at prices ranging from sixty to seventy cents on the dollar.

XIV.

Answering paragraph XIV, it denies the same and each and every allegation thereof.

(Testimony of John A. Laing.)

Exhibit No. 89—(Cont.)

XV.

Answering paragraph XV so far as the same is in any way material or relevant to the question of this defendant's interest in or title to the common stock of Northwestern Electric Company, this defendant denies the allegations in said paragraph contained and the whole thereof.

XVI.

Answering paragraph XVI, this defendant does not have information sufficient to form a belief as to any of the allegations in said paragraph contained, and therefore denies each and every allegation of said paragraph and the whole thereof.

XVII.

Answering paragraph XVII, this defendant does not have information sufficient to form a belief as to the allegations therein contained, and therefore denies each and every allegation of said paragraph and the whole thereof.

XVIII.

Answering paragraph XVIII, this defendant admits that Herbert Fleishacker and M. Fleishacker are residents of California and not within the jurisdiction of this Court, and that the principal of-

(Testimony of John A. Laing.)

Exhibit No. 89—(Cont.)

fice and place of business of the defendant, Northwestern Electric Company, is in Vancouver, in Clark County, Washington, where, under the By-Laws of said corporation, the meetings of its stockholders are held, but does not have information sufficient to form a belief as to the remaining allegations in said paragraph XVIII contained and therefore denies each and all of the allegations of said paragraph not hereinbefore specifically admitted.

The defendant, American Power & Light Company, without waiving but expressly relying upon its special appearance and objection to the jurisdiction of this Court over it heretofore made, and without subjecting itself to such jurisdiction but still appearing specially and only for the purpose of protecting and defending its interest in and its title to such shares of the common capital stock of defendant, Northwestern Electric Company, as may now stand in the name of or be held by or on behalf of said defendant, American Power & Light Company, and in reliance upon the order of this Court entered herein on January 28, 1935, granting it leave and authorizing it to appear specially for said purpose, as a further answer to so much of plaintiffs' second amended complaint as relates to said defendant's title to or interest in said common stock, says:

(Testimony of John A. Laing.)

Exhibit No. 89—(Cont.)

AS ITS FIRST AFFIRMATIVE DEFENSE:

I.

That at all times since on or about July 23, 1912, the duly authorized common stock of defendant, Northwestern Electric Company, consisted and consists of 100,000 shares of the par value of $100 per share, and that more than ten years prior to February 1, 1925, all of said common stock was issued as fully paid by said Northwestern Electric Company and during all of the period from the issuance of said stock to February 1, 1925, said stock was evidenced by stock certificates, regular in form and duly executed by said Northwestern Electric Company; and was bought and sold in the open market and otherwise dealt with by the owners and holders thereof and by said Northwestern Electric Company as fully paid up stock.

II.

That during the year 1925 this defendant purchased all but seventy shares of said common stock; that 97,953 shares thereof were purchased and the certificates evidencing the same were acquired and transferred in February and March of 1925, 1977 shares were purchased and the certificates evidencing the same acquired and transferred from time to time between April 1 and December 31, 1925, and the remaining 70 shares were all pur-

(Testimony of John A. Laing.)

Exhibit No. 89—(Cont.)

chased and the certificates evidencing the same acquired and transferred prior to June 30, 1930; that all of said common stock was purchased as fully paid stock in the open market, in good faith for value, and without knowledge or notice that such stock or any part thereof had not been fully paid for, if such were the fact, which, however, this defendant denies in the manner and to the extent in the body of its answer hereinbefore more particularly set forth; that by such purchase this defendant became the bona fide purchaser of all of said common stock, for value and without notice, and has been at all times since and now is the bona fide owner and holder thereof as fully paid and non-assessable stock.

AS ITS SECOND AFFIRMATIVE DEFENSE:

I.

That in so far as by their complaint herein plaintiffs seek to have the outstanding common capital stock of the defendant, Northwestern Electric Company, adjudged to be invalid or void and to have the same cancelled, their cause of action, if any, is barred by the statute of limitations of the State of Washington because this action was not commenced within the time limited by the laws of said state.

(Testimony of John A. Laing.)

Exhibit No. 89—(Cont.)

AS ITS THIRD AFFIRMATIVE DEFENSE:

I.

That on or about January 6, 1911, the defendant, Northwestern Electric Company, was duly organized as a corporation under the laws of the State of Washington, with an authorized capital of $5,000,000, consisting of 50,000 shares of common stock of the par value of $100 per share; that thereafter, with the unanimous concurrence and approval of all the subscribers to or owners of the stock in said corporation, all of said common stock was issued as fully paid and was evidenced by stock certificates regular in form and duly executed by said Northwestern Electric Company; that thereafter and on or about May 14, 1912, the capital stock of said Northwestern Electric Company was duly and regularly increased to $10,000,000 by the authorization of an additional 50,000 shares of common stock of the par value of $100 per share; that such increase was authorized by and with the unanimous consent and affirmative vote of all the then stockholders of said company, and a duly verified certificate of such increase, reciting the action of the stockholders with respect thereto and that the amount of the capital stock of the corporation actually paid in was $5,000,000, was thereafter, on July 23, 1912, filed, pursuant to the law, in the office of the Secretary of State of Washington, and

(Testimony of John A. Laing.)

Exhibit No. 89—(Cont.)

has at all times since remained on file in said office as a public record; that thereafter, and again with the unanimous concurrence of all the owners of the original stock, the certificates evidencing said original stock were recalled and stock certificates, regular in form, evidencing all of said $10,000,000 in par value of common stock were duly executed and issued by said Northwestern Electric Company and were delivered by said Company and received and dealt in by the owners and holders of said 100,000 shares as evidencing fully paid stock; that thereafter and on or about April 8, 1914, the capital stock of said Northwestern Electric Company was duly and regularly increased to $12,000,000 by the authorization of an additional 20,000 shares of six percent preferred stock of the par value of $100 per share; that such increase was authorized by and with the unanimous consent and affirmative vote of all the then stockholders of said company and duly verified certificate of such increase reciting the action of the stockholders with respect thereto and that the amount of the capital of the company actually paid in was $10,000,000, was thereafter, on April 24, 1924, filed, pursuant to law, in the office of the Secretary of State of Washington, and has at all times since remained on file there as a public record; that thereafter the certificates evidencing all of said $10,000,000

(Testimony of John A. Laing.)

Exhibit No. 89—(Cont.)

of common stock were recalled and new stock certificates, regular in form, showing the total capitalization of the company to be $12,000,000, consisting of $10,000,000 of common stock and $2,000,000 of six percent preferred stock, were duly executed and issued for all of said $10,000,000 of common stock; that said certificates were delivered by Northwestern Electric Company and received and dealt in by the owners and holders thereof as evidencing fully paid stock; that thereafter and on or about October 14, 1920, the capital stock of said Northwestern Electric Company was again duly and regularly increased to $22,000,000 by the authorization of the issuance of 100,000 shares of the par value of $100 per share of additional preferred stock, to be known as "first preferred stock", with a provision for the conversion of the original preferred stock into the newly authorized first preferred stock at the rate of nine-tenths of a share of first preferred stock for each entire share of the original preferred stock; that such increase was authorized by and with the unanimous consent and affirmative vote of the owners of two-thirds of the then capital stock of said company, and a duly verified certificate of such increase reciting the action of the stockholders with respect thereto and that the amount of the capital of the company actually paid in was $11,870,300, was thereafter, on November 4, 1920, filed, pursuant to law, in the

(Testimony of John A. Laing.)

Exhibit No. 89—(Cont.)

office of the Secretary of State of Washington and has at all times since remained on file as a public record; that thereafter, as certificates for common stock were presented to Northwestern Electric Company for transfer, new stock certificates, regular in form, showing the total capitalization of said Northwestern Electric Company to be $22,000,000, consisting of $10,000,000 of common stock, $2,000,000 of six percent preferred stock, and $10,000,000 of seven percent first preferred stock, were duly executed and issued; that all such new stock certificates executed and issued by said Northwestern Electric Company were delivered by it and received and dealt in by the owners and holders thereof as evidencing fully paid stock.

II.

That the original six percent preferred stock of said Northwestern Electric Company authorized April 8, 1914, was offered to the general investing public in units consisting of one share of such preferred stock and one-half share of common stock, and pursuant to such offer there was sold to divers persons and parties 2,321 shares of the common stock of said Northwestern Electric Company, which stock had been donated to said company by the owners and holders thereof for said purpose, and stock certificates, regular in form, evidencing said 2,321 shares of common stock were duly exe-

(Testimony of John A. Laing.)

Exhibit No. 89—(Cont.)

cuted, issued and delivered by said Northwestern Electric Company to the several purchasers thereof.

III.

That in 1912 an issue of $5,000,000 in par value of five per cent bonds was authorized by the defendant, Northwestern Electric Company, to be secured by a first mortgage on all of said corporation's property then owned or thereafter acquired. Subscriptions to one-half of this issue were taken and partially paid in but no bonds were actually sold. Instead the same were used as collateral to secure various interim loans made to said Northwestern Electric Company. That thereafter and on or about May 1, 1915, a new issue of $10,000,000 in par value of first mortgage bonds was authorized and sold. The 1912 mortgage and the bonds secured thereby were cancelled, and arrangements were made with the subscribers to said bond issue whereby the subscribers converted the amounts paid in on such subscriptions into stock units consisting of two shares of common stock for each $100 of original bond subscription and one share of the six percent preferred stock; and pursuant to such arrangement there were sold to divers persons and parties 43,500 shares of the common stock of said Northwestern Electric Company which had been donated to said corporation for said purpose by

(Testimony of John A. Laing.)

Exhibit No. 89—(Cont.)

the then owners and holders thereof, and stock certificates, regular in form, evidencing said 43,500 shares of common stock were duly executed, issued and delivered by Northwestern Electric Company to the several purchasers thereof.

IV.

That in January, 1916, said Northwestern Electric Company caused its common stock to be listed on the Stock and Bond Exchange of San Francisco, California, as fully paid and non-assessable stock, and continued such listing until on or about May 14, 1925, during all of which period said stock was traded in on said Exchange as fully paid stock, and as shares of the common stock were sold or purchased, said Northwestern Electric Company from time to time duly executed, issued and delivered to the several purchasers thereof new stock certificates, regular in form, evidencing the number of shares so purchased.

V.

That in each year since the organization of said Northwestern Electric Company, regular annual meetings of the stockholders of said company have been held, and that at each and all of said meetings prior to the purchase by this defendant of the common stock of said Northwestern Electric Company in 1925, all previous acts of the trustees and officers

(Testimony of John A. Laing.)

Exhibit No. 89—(Cont.)

of said company were approved, confirmed and ratified by the unanimous vote of all of the stockholders of the said company, both common and preferred, who were present in person or by proxy at said meetings.

VI.

That at the various times in its first affirmative defense hereinbefore alleged, this defendant purchased as fully paid stock all of the common stock of said Northwestern Electric Company or the certificates evidencing the same, in open market, in good faith and for value, relying upon the course of dealing with respect to said stock theretofore had and conducted by said Northwestern Electric Company and upon all and sundry the various representations made by said company that said stock was valid and fully paid for as hereinbefore alleged, and without knowledge or notice that such stock or any part thereof had not been fully paid for, if such were the fact, which, however, this defendant denies in the manner and to the extent in the body of its answer hereinbefore more particularly set forth; that by such purchase this defendant became the bona fide owner of all said common stock, for value and without notice, and has been at all times since and now is the bona fide owner and holder thereof as fully paid and non-assessable stock, and by its course of dealing in and repre-

(Testimony of John A. Laing.)

Exhibit No. 89—(Cont.)

sentations as to said common stock, culminating in the purchase thereof by this defendant, said Northwestern Electric Company and the plaintiffs herein, and each of them, became and are estopped to assert or claim that the common stock, or any part thereof, was or is not fully paid for or is in any way invalid or void.

Wherefore, this defendant prays that it may be adjudged and decreed to be the bona fide owner and holder of all of the common capital stock of the defendant, Northwestern Electric Company, as fully paid and non-assessable stock, and that its title to said stock may be quieted as against the plaintiffs and all persons claiming or hereafter to claim by, through or under them, or any of them, and as against all persons or parties whosoever situated similarly to the plaintiffs herein or on whose behalf this action may be deemed to be prosecuted as a representative action.

HALL & SCHAEFER
Vancouver, Washington
HAYDEN, METZGER & BLAIR
523 Tacoma Building, Tacoma, Pierce County, Washington
Attorneys for the Defendant American Power & Light Company

(Testimony of John A. Laing.)

Exhibit No. 89—(Cont.)

State of Washington
County of Pierce—ss.

F. D. Metzger, being first duly sworn, on oath, deposes and says: That he is one of the attorneys for the defendant, American Power & Light Company, and makes this verification on its behalf, for the reason that said American Power & Light Company is a nonresident corporation and there is no officer of said defendant corporation now present within the State of Washington who is authorized to make such verification on its behalf; that he has read the above and foregoing answer, knows the contents thereof, and believes the same to be true.

F. D. METZGER

Subscribed and sworn to before me this 23rd day of May, 1936.

E. M. HAYDEN
Notary public in and for the State of Washington, residing at Tacoma.

[Title of Superior Court and Cause.]

ANSWER OF NORTHWESTERN ELECTRIC COMPANY TO SECOND AMENDED COMPLAINT

Comes now the defendant Northwestern Electric Company and, for answer to the plaintiffs' second

(Testimony of John A. Laing.)

Exhibit No. 89—(Cont.)

amended complaint herein, denies, admits and alleges:

I.

Admits the allegations of paragraph I thereof.

II.

Admits the allegations of paragraph II thereof, except that this defendant alleges that the name of the other defendant herein is "American Power & Light Company".

III.

Answering paragraph III thereof, this defendant admits that it was incorporated with an authorized capital stock, as fixed by its articles of incorporations, of $5,000,000.00, divided into 50,000 shares of common stock of the par value of $100.00 each; denies that all of said common stock was issued on or about July 7, 1911, and alleges that the entire 50,000 shares of said stock had been subscribed for prior to March 14, 1911, that certificates for 49,997 of said 50,000 shares were issued on said March 14, 1911, and that certificates for the remaining three of said 50,000 shares were issued on August 18, 1911; admits that said 50,000 shares of common stock have at all times been outstanding since said August 18, 1911; and denies each and every other allegation contained in said paragraph III.

(Testimony of John A. Laing.)

Exhibit No. 89—(Cont.)

IV.

Answering paragraph IV thereof, this defendant admits that its capital stock was increased in the amount and by the number of shares therein alleged, and that its total authorized capital stock then and thereby became 100,000 shares of the par value of $100.00 each, or a total of $10,000,000.00; that such increase from 50,000 shares to 100,000 shares was authorized at a meeting of its stockholders held on May 14, 1912, and that the verified certificate evidencing such increase of capital stock was filed in the office of the Secretary of State of the State of Washington on July 23, 1912.

V.

Answering paragraph V thereof, this defendant admits that the certificate of such increase of its capital stock, verified by its proper officers, was filed in the office of the Secretary of State of the State of Washington on July 23, 1912; admits that said certificate recited that the amount of the common capital stock of this defendant actually paid for at and prior to the time of filing such certificate was $5,000,000.00; admits that ever since said date 100,000 shares of this defendant's common capital stock of the par value of $100.00 each have been issued and outstanding; and denies each and every other allegation contained in said paragraph V.

(Testimony of John A. Laing.)

Exhibit No. 89—(Cont.)

VI.

Answering paragraph VI thereof, this defendant denies each and every allegation in said paragraph contained, except that this defendant admits that said American Power & Light Company purchased and acquired on the open market and not from this defendant approximately 98% of this defendant's 100,000 shares of common capital stock in the months of February and March, 1925, and similarly purchased and acquired the remainder of said common shares from time to time thereafter, and admits that at no time since American Power & Light Company acquired said shares of common stock has this defendant made any call or demand upon said American Power & Light Company or upon anyone else to pay for said shares of common stock, or any part thereof; and alleges that ever since said American Power & Light Company purchased a majority of the outstanding shares of the common capital stock of this defendant in the months of February and March, 1925, the facts in the knowledge of this defendant and its trustees and directors have been such as to preclude and prevent the making of any call or demand upon said American Power & Light Company for payment of any sum or sums on account of said 100,000 shares of capital stock or any thereof.

(Testimony of John A. Laing.)

Exhibit No. 89—(Cont.)

VII.

Answering paragraph VII thereof, this defendant admits that the 100,000 shares of common stock therein referred to are now held by American Power & Light Company or are subject to its control, but denies that said shares, or any of them, were fraudulently issued or reissued.

VIII.

Answering paragraph VIII thereof, this defendant admits that on or about April 8, 1914, the issuance of $2,000,000.00 of 6% preferred stock, consisting of 20,000 shares of the par value of $100.00 each, was authorized by the stockholders of said corporation, admits that a duly verified certificate of such authorized increase was filed in the office of the Secretary of State of the State of Washington and that a certified copy thereof was subsequently filed in the office of the Corporation Commissioner of the State of Oregon, and that said certificate recited that the amount actually paid in on capital stock was $10,000,000.00, but denies that nothing had been paid on said capital stock; admits that a portion of said 6% preferred stock was issued and sold to the general investing public, but denies that it was sold for cash at substantially its par value, and alleges a portion of said 6% preferred stock was offered for sale and was sold

(Testimony of John A. Laing.)

Exhibit No. 89—(Cont.)

in units composed of one share of such preferred stock and one-half share of this defendant's common stock at a price of approximately $90.00 for each such unit; denies that on or about June 6, 1921, the articles of incorporation of this defendant were amended to authorize the issuance of $10,000,000.00 of 7% preferred stock, consisting of 100,000 shares of the par value of $100.00 each, but alleges that on October 14, 1920, this defendant's stockholders caused its authorized capital stock to be increased by authorizing the issuance of 100,000 shares of 7% first preferred stock of the par value of $100.00 per share, in addition to said $2,000,000.00 of 6% preferred stock, and that a certificate of such increase was filed in the office of the Secretary of State of the State of Washington on November 4, 1920, and that such certificate recited, under oath, that the amount of this defendant's capital stock then actually paid in was $11,870,300.00; admits that, when the authorized capital stock of this defendant was so increased by the authorization of said 7% first preferred stock, this defendant's total capital stock thereupon became and was $22,000,000.00 in aggregate par value; admits that when such increase in this defendant's authorized capital stock was authorized by its stockholders on October

(Testimony of John A. Laing.)

Exhibit No. 89—(Cont.)

14, 1920, provision was made for the exchange of outstanding shares of 6% preferred stock for shares of said 7% first preferred stock on the basis of 9/10 of one share of said 7% preferred stock for one share of said 6% preferred stock, and admits that many of the outstanding shares of said 6% preferred stock were then or thereafter exchanged for shares of said 7% first preferred stock on said basis of exchange; admits that there is now outstanding in the hands of the general public preferred stock of this defendant of the aggregate par value of $4,817,000.00, of which $72,900.00 is 6% preferred stock and the remainder is 7% first preferred stock; admits that less than 400 shares of this defendant's preferred capital stock are owned by the defendants, or either of them, or by any corporation subsidiary to or affiliated with said corporations, or either of them, so far as disclosed by this defendant's records or as known to this defendant; and denies each and every other allegation in said paragraph VIII contained.

IX.

Answering paragraph IX thereof, this defendant admits that under the laws of the State of Washington, for more than 20 years last past, it has been required to make an annual report to the

(Testimony of John A. Laing.)

Exhibit No. 89—(Cont.)

Department of Public Service of the State of Washington or to its predecessor, and that defendant still is required to make such reports, and admits that such reports were and are required to show and to recite, under oath, the amount of its capital stock issued and the amount paid therefor, but denies that the amount of defendant's investment in plant and equipment as so reported was always or ever $10,000,000.00 in excess of this defendant's actual investment in plant and equipment; admits that this defendant has been required annually to file reports with the Public Utilities Commissioner of the State of Oregon, or with his predecessors in that office under the laws of Oregon, and still is required to file such reports, and that such reports so filed in Oregon have contained information similar to that filed in Washington as to said defendant's capital stock, but denies that any report so filed in Oregon showed an investment in plant and equipment $10,000,000.00 in excess of this defendant's actual investment therein; admits that this defendant from time to time since 1914 has issued balance sheets and financial statements, but denies that such balance sheets or financial statements, or any of them, have shown such investment to be $10,000,000.00 in excess of the amount of defendant's actual investment in plant and equipment; admits that this defendant has from time to time furnished financial

(Testimony of John A. Laing.)

Exhibit No. 89—(Cont.)

statements to sundry statistical publications, but denies that such statements, or any of them, showed as invested in plant and equipment $10,000,000.00 in excess of the amount of defendant's actual investment therein; alleges that such statistical information as was furnished by this defendant to the regulatory authorities of the States of Oregon and Washington and to statistical publications or others conformed with the original entries as to such capital stock and the amount paid in thereon and as to the defendant's investment in plant and equipment which had been set up on this defendant's books of account more than ten years prior to March 1, 1925, plus the actual cost of subsequent additions to said plant and equipment, and that said entries, and each and all of them, were made at the instance and reflected the judgment of the board of trustees of this defendant holding office at the time such original entries were made; and further alleges that at the time American Power & Light Company purchased a majority of this defendant's outstanding shares of common stock, and when a majority of the former trustees of this defendant resigned and were succeeded by new trustees immediately following such purchase by American Power & Light Company, namely in the month of March, 1925, such newly elected trustees of this defendant and its officers accepted as cor-

(Testimony of John A. Laing.)

Exhibit No. 89—(Cont.)

rect the entries then appearing on said books of account and its trustees and officers have since continued so to recognize such entries, and that all entries thereafter made concerning the value of plant and investment continued to reflect said original entries, plus the cost of additions and betterments made thereto from time to time; and further alleges that immediately following such purchase by American Power & Light Company of a majority of the shares of the common stock of this defendant, and the election of new trustees of this defendant following such purchase as aforesaid, this defendant discontinued the offering and sale of its preferred stock.

This defendant has no knowledge or information sufficient to form a belief as to what statements, if any, were issued by or with the knowledge of said American Power & Light Company, and therefore denies any and all allegations relating to the issuance of statements by American Power & Light Company concerning the common stock of this defendant; and this defendant denies each and every other allegation contained in said paragraph IX.

X.

Answering paragraph X thereof, this defendant has no knowledge or information sufficient to form

(Testimony of John A. Laing.)

Exhibit No. 89—(Cont.)

a belief as to the knowledge or information of the plaintiffs, or any of them, or any of the investors in said preferred stock, with respect to any of the matters or things alleged or referred to in said paragraph X, or as to when said plaintiffs, or any of them, learned what they allege in said paragraph X to be the facts as to such matters, and therefore denies each and all of the allegations contained in said paragraph as to plaintiffs' lack of knowledge with respect to such allegations or as to the time when the several plaintiffs may have acquired knowledge with respect thereto, and this defendant denies each and every other allegation contained in said paragraph X.

XI.

Admits the allegations of paragraph XI thereof.

XII.

Answering paragraph XII thereof, this defendant admits that its officers and trustees have made no call or demand upon American Power & Light Company to pay for said common stock, or any part thereof, or to surrender or cancel the same or any part thereof, and denies each and every other allegation in said paragraph XII contained.

XIII.

Answering paragraph XIII thereof, this defen-

(Testimony of John A. Laing.)

Exhibit No. 89—(Cont.)

dant admits that it has from time to time borrowed money from American Power & Light Company on open account, upon which this defendant is paying interest, but alleges that the principal of said indebtedness is not now due or payable and will not become due or payable until after payment of all of defendant's bonds, the maturity of which bonds has been duly extended to May 1, 1945; admits that it passed the dividends on its preferred stocks in 1933 and again in 1934; but denies each and every other allegation in said paragraph XIII contained; and in respect of the allegations therein set forth as to the alleged market values of defendant's said preferred stocks and bonds, this defendant alleges that for more than six months last past its said 7% first preferred stock has been and is now quoted on the open market in the City of Portland, Oregon, at from $60.00 to $70.00 per share, and that its said bonds during said six months' period have been and are commanding a premium and are being dealt in, purchased and sold in said Portland market at and above the face value thereof.

XIV.

Denies each and all of the allegations of paragraph XIV thereof, and denies that the plaintiffs are entitled to have said 100,000 shares of common stock, or any part thereof, cancelled.

(Testimony of John A. Laing.)

Exhibit No. 89—(Cont.)

XV.

Answering paragraph XV thereof, this defendant denies that its trustees have acted or cooperated with American Power & Light Company in any way other than for the proper and efficient management of said corporation, or that they have wholly or at all aligned themselves with said American Power & Light Company or will continue so to do in any way or manenr or for any purpose other than for the proper and efficient management of said corporation for the benefit of all persons interested therein, including the preferred stockholders; further denies that this defendant or its trustees during any of the times that said American Power & Light Company has been the principal owner of said common stock have ever illegally paid any dividends on said common stock, or have been guilty of any illegal or improper act in relation thereto, and denies that the plaintiffs are entitled to the cancellation of said 100,000 shares of common stock, or any part thereof; and denies each and every other allegation contained in said paragraph XV.

XVI.

Answering paragraph XVI thereof, this defendant admits that the plaintiff, Elmer B. Allen, is

(Testimony of John A. Laing.)

Exhibit No. 89—(Cont.)

the registered owner of the number of shares of its 7% first preferred stock therein stated and described, and that the same were acquired by him on or about the respective dates therein set forth; but this defendant has no knowledge or information as to the price per share which said plaintiff paid for any of said shares of stock, and therefore denies the allegation contained in said paragraph XVI as to the price paid by said Allen for his said shares of preferred stock; and denies that any of said shares were sold to him by said defendant or through any of its agents or employees.

Admits that the plaintiff, Fred Brook, is the registered owner of ten shares of this defendant's 7% first preferred stock, but denies that he purchased said ten shares of stock from said defendant on or about October 1, 1925, and alleges that said plaintiff purchased two of said shares at par through agents of said defendant on or about September 20, 1924, and that he purchased the remaining eight shares on or about November 21, 1929, but denies that said eight shares of stock were purchased from this defendant or through any of its agents or employees; and this defendant has no knowledge or information as to the price per share that said plaintiff paid for any of said eight shares of stock, and therefore denies the allegation contained in said paragraph XVI as to the price

(Testimony of John A. Laing.)

Exhibit No. 89—(Cont.)

paid by said Brook for his said eight shares of preferred stock.

Admits that the plaintiff, John D. Cary, is the registered owner of ten shares of this defendant's 7% first preferred stock, but denies that he purchased the same from this defendant or through any of its agents or employees; and this defendant has no knowledge or information as to the price per share that said plaintiff paid for any of said ten shares of stock, and therefore denies the allegation contained in said paragraph XVI as to the price paid by said Cary for his said ten shares of preferred stock.

Admits that the plaintiffs, H. P. Hansen and Rita Hansen, are the registered owners of fifteen shares of this defendant's 7% first preferred stock, but denies that said plaintiffs purchased said shares of stock or any of them from this defendant or through any of its agents or employees, and this defendant has no knowledge or information as to the price or prices per share that said plaintiffs paid for said shares of stock, and therefore denies the allegation contained in said paragraph XVI as to the price or prices paid by said plaintiffs for their said fifteen shares of preferred stock.

Admits that the plaintiffs, Martin and Ellen Lundeen, are the registered owners of the fourteen shares of this defendant's 7% first preferred stock

(Testimony of John A Laing.)

Exhibit No. 89—(Cont.)

therein referred to and described, and admits that all of said shares were purchased by them through agents of this defendant; but denies that all or any of said shares were purchased by them at a price exceeding $100.00 per share, and alleges that four of said shares were purchased by them at the price of $95.00 per share, and that ten of said shares were purchased by them at the price of $100.00 per share.

Admits that Elsie Mills (referred to in plaintiffs' complaint as Ellis Mills) is the registered owner of five shares of this defendant's 7% first preferred stock, evidenced by certificate No. 9827, but denies that said shares were purchased from this defendant or through any of its agents or employees, and this defendant has no knowledge or information as to the price per share at which said shares were purchased, and therefore denies the allegation contained in said paragraph XVI as to the price paid by said Elsie Mills for her said five shares of preferred stock.

Admits that on or about August 7, 1931, the plaintiff, Andrew Geo. Stenhouse, purchased ten shares of this defendant's 7% first preferred stock, evidenced by certificate No. 14326, but this defendant has no knowledge or information sufficient to form a belief as to whether he was at said time a minor, or as to whether said shares were purchased through

(Testimony of John A Laing.)

Exhibit No. 89—(Cont.)

Grace Stenhouse as his guardian, or as to the price per share at which said shares were purchased, and therefore denies each and all of such allegations; and denies that any of said shares were purchased from this defendant or through any of its agents or employees. This defendant further denies that at the time of the filing of plaintiffs' said second amended complaint the said Andrew Geo. Stenhouse was the registered owner of any share or shares of the capital stock of this defendant, or that he is the registered owner of any of said shares at this time.

XVII.

Answering paragraph XVII thereof, this defendant admits that at the time of the filing of plaintiffs' second amended complaint this defendant had approximately 2900 stockholders, but this defendant has no knowledge or information sufficient to form a belief as to the remaining allegations of said paragraph XVII and therefore denies said allegations and each and all of them.

XVIII.

Answering paragraph XVIII thereof, this defendant admits that Herbert Fleishhacker and M. Fleishhacker are residents of California and not within the jurisdiction of this court, and that the principal office and place of business of the defendant, Northwestern Electric Company, is in

(Testimony of John A Laing.)

Exhibit No. 89—(Cont.)

Vancouver, in Clark County, Washington, where, under the by-laws of said corporation, the meetings of its stockholders are held; but this defendant does not have knowledge or information sufficient to form a belief as to the remaining allegations contained in said paragraph XVIII and therefore denies each and all of said remaining allegations.

Wherefore, having fully answered said second amended complaint, this defendant prays that said complaint be dismissed, that plaintiffs take nothing thereby, and that this defendant have judgment against plaintiffs for its costs and disbursements incurred herein.

ELLIS & EVANS
Attorneys for Defendant
Northwestern Electric Company

LAING & GRAY
Of Counsel for Defendant
Northwestern Electric Company

State of Oregon
County of Multnomah—ss.

I, C. W. Platt, being first duly sworn, upon oath depose and say: That I am the Secretary of Northwestern Electric Company, a corporation, one of the defendants in the above entitled action, and as such officer make this verification for and on behalf of said defendant; that I have read the fore-

(Testimony of John A Laing.)

Exhibit No. 89—(Cont.)

going answer, know the contents thereof, and verily believe the same to be true.

C. W. PLATT.

Subscribed and sworn to before me this 25th day of May, 1936.

[Notarial Seal] HENRY S. GRAY
Notary Public for Oregon
Residing at Portland therein.

My commission expires September 6, 1936.

[Title of Superior Court and Cause.]

No. 14,838

STIPULATION

It Is Hereby Stipulated by and between the parties hereto, through their respective attorneys, defendant American Power & Light Company joining in this stipulation with the same reservation of its rights under its special appearance and the previous order of this court as set forth in its Answer on file herein, as follows:

That the commission heretofore issued under date of August 14, 1936, to Alva W. Person for the taking of the depositions of certain witnesses shall be recalled and returned to the Court without the taking of any depositions thereunder;

That the assignment of this case for trial on Sep-

(Testimony of John A Laing.)

Exhibit No. 89—(Cont.)

tember 15, 1936, shall be vacated and this cause shall be stricken from the trial calendar;

That if, within 60 days from this date, by appropriate action, the par value of the authorized and now outstanding 100,000 shares of the common stock of defendant Northwestern Electric Company shall have been reduced from $100.00 per share to $35.00 per share, and there shall have been issued to and accepted by defendant American Power & Light Company 100,000 shares of fully paid and non-assessable common stock of the par value of $35.00 per share in exchange for the 100,000 shares of common stock of said Northwestern Electric Company of the par value of $100.00 per share now owned by defendant American Power & Light Company, then and upon the filing in this action of a certificate executed by the secretary or assistant secretary and under the seal of defendant Northwestern Electric Company that the aforesaid reduction and exchange have been consummated, a final decree upon the merits of this action in the form hereunto annexed shall be entered in this action upon application of any of the parties hereto;

That the plaintiffs in this action and their attorneys will cooperate to the extent of plaintiffs' interests as stockholders of the defendant Northwestern Electric Company in bringing about such determina-

(Testimony of John A Laing.)

Exhibit No. 89—(Cont.)

tion of the issues in this action and in facilitating such revision of the capital stock structure of the defendant Northwestern Electric Company;

That upon the entry of such decree as aforesaid, the defendant Northwestern Electric Company, in recognition of the cooperation of plaintiffs and their attorneys in bringing about such determination of the issues in this action and in facilitating the proposed revision of the capital structure of Northwestern Electric Company, will forthwith pay to plaintiffs or to their attorneys of record herein the sum of $3500.00 to reimburse plaintiffs for disbursements, including fees paid or payable to attorneys and counsel, incurred by plaintiffs in connection with this action;

That in the event the aforesaid reduction in the par value and the aforesaid exchange of common stock shall not be consummated within the time hereinabove specified, this stipulation shall have no further force and effect, and this cause shall be assigned for trial upon the notice provided by law, and that in such event this stipulation shall not be used or construed in any way against or to the prejudice of any party hereto, or constitute in any manner or to any extent a waiver of any existing right or claim of any party hereto.

(Testimony of John A Laing.)

Exhibit No. 89—(Cont.)

Dated at Portland, Oregon, this 18th day of August, 1936.

(Signed) W. H. ABEL
CLARK & CLARK
(Signed) CHARLES M. THOMAS
Of Attorneys for Plaintiffs
(Signed) HAYDEN, METZGER & BLAIR
Attorneys for defendant American Power & Light Company, appearing specially as aforesaid.
(Signed) ELLIS EVANS
(Signed) LAING & GRAY
Attorneys for defendant Northwestern Electric Company.

[Title of Superior Court and Cause.]

No. 14,838

CERTIFICATE OF SECRETARY OF NORTHWESTERN ELECTRIC COMPANY

State of Oregon
County of Multnomah—ss.

I, C. W. Platt, being first duly sworn, on oath do certify and state:

That I am the duly elected, qualified and acting secretary of the defendant Northwestern Electric Company, a corporation of the State of Washington, and as such secretary have in my possession

(Testimony of John A Laing.)

Exhibit No. 89—(Cont.)

and custody the corporate records and the corporate seal of said corporation; that by stipulation entitled in the above entitled cause dated August 18, 1936, and now on file in said cause, entered into and signed by the plaintiffs and the defendants in said cause by their respective attorneys of record therein, it is provided in part as follows:

"That if, within 60 days from this date, by appropriate action, the par value of the authorized and now outstanding 100,000 shares of the common stock of defendant Northwestern Electric Company shall have been reduced from $100.00 per share to $35.00 per share, and there shall have been issued to and accepted by defendant American Power & Light Company 100,000 shares of fully paid and non-assessable common stock of the par value of $35.00 per share in exchange for the 100,000 shares of common stock of said Northwestern Electric Company of the par value of $100.00 per share now owned by defendant American Power & Light Company, then and upon the filing in this action of a certificate executed by the secretary or assistant secretary and under the seal of defendant Northwestern Electric Company that the aforesaid reduction and exchange have been consummated, a final decree upon the merits of this action in the form hereunto annexed shall be entered in this

(Testimony of John A Laing.)

Exhibit No. 89—(Cont.)

action upon application of any of the parties hereto;"

and that the par value of the 100,000 shares of the common stock of the defendant Northwestern Electric Company has been reduced by appropriate corporate action from $100.00 to $35.00 per share, and there have been issued to and accepted by American Power & Light Company certificates for 100,000 shares of fully paid and non-assessable common stock of said Northwestern Electric Company of the par value of $35.00 per share in exchange for, and upon the surrender and cancellation of, the certificates heretofore outstanding for 100,000 shares of the common stock of Northwestern Electric Company of the par value of $100.00 per share, all as stipulated and proved for in and by the above quoted paragraph of said stipulation dated August 18, 1936.

In Witness Whereof, I have hereunto set my hand and the seal of said Northwestern Electric Company this 17th day of September, 1936.

[Corporate Seal] C. W. PLATT

Secretary of Northwestern Electric Company

Subscribed and sworn to before me this 17th day of September, 1936.

[Notarial Seal] JEAN McGILCHRIST

Notary Public for Oregon.

My commission expires August 2, 1940.

(Testimony of John A Laing.)

Exhibit No. 89—(Cont.)

In the Superior Court of the State of Washington
in and for Clark County
No. 14,838

ELMER B. ALLEN, FRED BROOK, JOHN D. CARY, H. P. HANSEN, RITA HANSEN, MARTIN LUNDEEN, ELLEN LUNDEEN, AND ANDREW GEO. STENHOUSE, a minor, by his guardian GRACE STENHOUSE,
Plaintiffs,

vs.

NORTHWESTERN ELECTRIC COMPANY, a corporation, and AMERICAN POWER & LIGHT COMPANY, a corporation,
Defendants.

FINAL DECREE

Based upon the pleadings, files and records in this action, and upon the stipulation of the parties dated August 18, 1936, and on file herein, and it appearing to the Court from the certificate verified September 17, 1936, and now on file herein, executed by C. W. Platt as secretary of defendant Northwestern Electric Company and under the seal of said Northwestern Electric Company, that the reduction in the par value of the common stock of said defendant and the exchange of the common stock of said defendant referred to in said stipulation have been consummated, and application hav-

(Testimony of John A Laing.)

Exhibit No. 89—(Cont.)

ing been made for the entry of a final decree herein, pursuant to said stipulation, and the Court being now fully advised in the premises, it does now and hereby

Order, Adjudge and Decree as follows:

(1) That defendant American Power & Light Company, a corporation, is the owner of 100,000 shares of fully paid and non-assessable common capital stock of the defendant Northwestern Electric Company, of the par value of $35.00 per share, free and clear of any and all cloud cast upon said stock or the title of said defendant American Power & Light Company thereto by reason of any matter or thing alleged by the plaintiffs herein, and that the title of said defendant American Power & Light Company in and to said 100,000 shares of common stock is now and hereby quieted as against the plaintiffs and all persons claiming or who may hereafter claim by, through or under the plaintiffs, or any of them, and as against all persons or parties whomsoever situated similarly to the plaintiffs herein or in whose behalf this action may be held to have been instituted as a representative action by the plaintiffs;

(2) That the plaintiffs shall take nothing by this action, and as to them this action is hereby dismissed, with prejudice, but without costs to any party.

(Testimony of John A Laing.)

(Exhibit No. 89—Cont.)

Done in open court this 17th day of September, 1936.

(Signed) GEO. B. SIMPSON
Judge

Q. (By Mr. Priest) Mr. Laing will you please read into the record Paragraph No. 1 of the final decree which comprises the last paper, which is a part of Exhibit 89. [1291]

A. Paragraph 1 of the Court's decree reads as follows: "That defendant, American Power & Light Company, a corporation, is the owner of 100,000 shares of fully paid and non-assessable common capital stock of the defendant Northwestern Electric Company, of the par value of $35.00 per share, free and clear of any and all cloud cast upon said stock or the title of said defendant, American Power & Light Company thereto by reason of any matter or thing alleged by the plaintiffs herein; and that the title of said defendant American Power & Light Company in and to said 100,000 shares of common stock is now and hereby quieted as against the plaintiffs and all persons claiming or who may hereafter claim by, through or under the plaintiffs, or any of them, and as against all persons or parties whomsoever situated similarly to the plaintiffs herein or in whose behalf this action may be held to have been instituted as a representative action by the plaintiffs;"

(Testimony of John A Laing.)

Mr. Priest: The American Power & Light Company also rests, Mr. Examiner.

The Trial Examiner: I would like to ask the witness a question.

Mr. Priest: Yes, sir, Mr. Examiner.

The Trial Examiner: Q. Mr. Laing, neither the Federal Power Commission, the Oregon Public Utilities Commissioner nor the Washington Public Service Commission were parties [1292] to this proceeding, were they?

A. The two state regulatory bodies were parties to the change in the capital stock and the issuance of the new certificates for $35.00 per share. A formal proceeding was held in both cases.

The Trial Examiner: Q. They were not, however,—I am asking if they were involved in any way in this case of Allen versus the Northwestern Electric Company?

A. No, that was a private suit between the parties.

The Trial Examiner: That is all.

The Witness: But the two state commissions were necessary parties to the settlement arrived at, because it was necessary for them to approve and authorize the issuance of the stock certificates. [1293]

The Trial Examiner: That is only through the provisions of the state authorizing the issuance of the stock, you mean? They were not parties to the proceedings and did not sign any stipulation in that case?

(Testimony of John A Laing.)

A. There are orders in the record, Your Honor, to show that these two state regulatory bodies officially authorized the issuance of the 100,000 shares at $35.00, which was the basis on which that suit was disposed of.

The Trial Examiner: I think you answered my question originally on that. If there is anything further on the other that is not in evidence now, but is in by reference from the previous hearing, we will get to that.

Mr. Slaff: While you are reading into the record, will you go back to page 2 of the stipulation and read the last paragraph on that page,—the last incomplete paragraph on page 3?

Mr. Laing: That is as to the cost of the settlement?

Mr. Slaff: Beginning "That upon the entry of such decree——".

A. "That upon the entry of such decree as aforesaid, the defendant Northwestern Electric Company, in recognition of the cooperation of plaintiffs and their attorneys in bringing about such determination of the issues in this action and in facilitating the proposed revision of the capital structure of Northwestern Electric Company, will forth- [1294] with pay to plaintiffs or to their attorneys of record herein the sum of $3,500, to reimburse plaintiffs for disbursements, including fees paid or payable to attorneys and counsel, incurred by plaintiffs in connection with this action;" [1295]

Hearing Room, 12th Floor,
Hurley Wright Building,
1800 Pennsylvania Avenue, N.W.,
Washington, D. C.
Wednesday, May 21, 1941.

Oral argument in the above-entitled matter came on for hearing pursuant to notice at 9:45 o'clock a.m.

Before Commissioners:
Leland Olds, Chairman
Clyde L. Seavey
Claude L. Draper
Basil Manly
John W. Scott [1304]

The Chairman: The hearing will come to order.

This is an argument on the re-hearing ordered in proceeding by the Commission's order of January 21, 1941. The original hearing was held in this matter during the summer of 1940 and our opinion therein was issued on December 6.

Thereafter, the respondent, Northwestern Electric Company applied for re-hearing and the application was denied in part, but granted however, "for the purpose only of permitting the presentation of a plan of disposition of the amount of $3,500,000 which the Commission in paragraph 2-A of its order of December 6, 1940 ordered Northwestern Electric Company to make disposition."

On application we also permitted American Power & Light Company, the owner of all the common stock of Northwestern Electric Company to

become an intervener and party to these proceedings.

Hearings were held in Portland, Oregon at the request of respondent and intervener, and at the conclusion thereof, Commission counsel announced that he would not file any brief while counsel for the two companies asked for time to file.

The Examiner allowed approximately 45 days for filing of briefs. On the due date, we were advised by letter from counsel for both companies that "Our offer of evidence with respect to the fair value of the properties of the respondent and our [1305] several defenses grounded upon questions of law having been rejected, it is apparent that both the trial examiner and the Commission consider that the issues of this proceeding are to be determined solely in accordance with the Commission's accounting requirements and concepts as formulated by the Commission and its staff.

"In the circumstances it appears to us that no useful purpose would be served by the submission of further argument or suggestions on the part of the respondent and intervener at this time."

We have ordered this oral argument so that counsel may apprise us of the reasons which they believe should compel us to change our original decision.

The procedure will be for counsel for the respondent to open, followed by counsel for the intervener and then counsel for the Commission. Counsel for the respondent and intervener may then have a short time for rebuttal.

I am going to ask that the order involved in this

hearing be made a part of the record without reading.

(The order is copied herein as instructed.)

United States of America
Federal Power Commission

Commissioners: Leland Olds, Chairman, Basil Manly, John W. Scott and Clyde L. Seavey. Claude L. Draper not participating. [1306]

April 26, 1941.

Docket No. IT-5642

In the Matter of

Northwestern Electric Company

ORDER CONTINUING ARGUMENT

It appearing to the Commission that:

An informal application has been made by counsel for respondent and intervener herein for a continuance of the oral argument heretofore set by order of this Commission of April 18, 1941, to be held before the Commission, en banc, on April 30, 1941;

The Commission finds that:

Good cause exists for such continuance;

The Commission orders that:

Said oral argument be and the same is hereby continued to May 21, 1941, at 9:45 a.m., in the Hearing Room of the Commission, 1800 Pennsylvania Avenue, N. W., Washington, D. C.

By the Commission.

LEON M. FUQUAY,
Secretary.

The Chairman: I would like to know how much time the several counsel will want for their presentation?

Mr. Laing: Mr. Chairman, this is John Laing speaking of Portland. Mr. Priest and I have arranged to divide the presentation of the argument in behalf of Northwestern and Mr. Priest will also make an argument in behalf of the intervener [1307] in connection with this matter.

It was our belief that, subject to perhaps undue prolongation of the discussion by questions and answers, that might come up in the course of the discussion, and making an allowance for a reasonable amount of that sort of questioning and answering, that we could complete what we had to say in less than two hours time.

The Chairman: That is both of you, together?

Mr. Laing: Divided between us, yes, sir.

The Chairman: Thank you very much.

What time will you need?

Mr. Slaff: I will take whatever is left over. That is to say, I should judge that perhaps an hour or less will do for me.

The Chairman: Will you note for the record the appearances.

Mr. Laing: Mr. Chairman, members of the Commission——

Commissioner Scott: Will you state for the record the appearances of counsel.

Mr. Laing: John A. Laing of the firm of Laing, Gray and Smith, for the respondent, Northwestern

Electric Company; Mr. A. J. G. Priest, Mr. Sidman I. Barber, of the firm of Reid & Priest, for Northwestern Electric Company, and also for the intervener American Power & Light Company.

Mr. Slaff: George Slaff for the Commission. [1308]

The Chairman: Now you may proceed, Mr. Laing.

ARGUMENT OF JOHN A. LAING

Mr. Laing: Mr. Chairman, members of the Commission——

The Chairman: (Interposing) I wonder if you could come up here. Perhaps it would make it a little easier for the reporter.

Mr. Laing: Yes, of course.

I think it would help us to get a clear perspective of what this rather limited issue is about if I briefly review the history of the Northwestern Electric Company as it was developed in the earlier hearing, earlier session in this proceeding.

Possibly all members of the Commission are all familiar with that, but I think it will help to clarify the picture somewhat if we go back into a little ancient history.

This corporation was organized under the laws of Washington in March of 1911. At the outset it had an authorized capital stock of $5,000,000 consisting of 50,000 shares of the par value $100 per share.

The company was organized by men in San Francisco, referred to throughout this record as the

Fleishackers, Mortimer Fleishacker and his brother Herbert Fleishacker, who were bankers and business men.

The stock was subscribed for by men who were clearly their appointees or agents. Neither of the Fleishackers [1309] signed or subscribed for any of the stock originally.

The company got into business, as far as its electrical operations were concerned, by building a hydroelectric plant on the White Salmon River 60-odd miles from Portland on the State of Washington side of the Columbia River.

They built a transmission line from there to Camas, where there was a very large pulp and paper company, which had contracted for some of the power load, and while they were engaged in getting that ready, the Fleishackers secured for the Northwestern Electric Company a franchise to distribute electric energy in the City of Portland, and they built their transmission line on down to Portland, and built a distribution system in Portland, actually began operations in the City of Portland by the middle of 1914.

The financing of the company up to that time was largely by short term borrowings of one kind or another. The Fleishackers put in some of their own money under their banking partnership or financial partnership of A. Fleishacker and Sons, and then they borrowed money from various banks, issued some short-term notes with their guarantees on them. They did no permanent financing until some-

time after the project was ready for what might be called actual operation.

In the meantime, along about, I think, in 1912, they amended their articles of incorporation, or filed a certificate of increase in capital stock, to provide for another 50,000 shares [1310] of the common stock with a par value of $100 which made a total authorized capital stock of 100,000 shares of a par value of $100 each. That was the only kind of stock or the only kind of capitalization in stock that it had until sometime along in 1915, I believe it was, when they authorized an issue of preferred stock, which was a six percent preferred stock, which was put out on the market very largely with the sweetener of some of this common stock which the Fleishackers made available as an inducement to people to buy the preferred.

The history of this common stock in those early days is a strange and wonderful thing, from any standpoint of what you might call legitimate, or even legitimate financing for those days. Particularly in that the resolutions which were adopted by the board of directors of the company in 1912, and again in 1915, which had to do with determining the paid up status of that stock, I am frank to say, don't even make sense to me, and I have examined them several times, and I don't think that anyone reading them will feel, either that they make any sense or that they say what they meant to say, as near as one could deduce that from collateral considerations, or that they are even consistent with

one another. But in any event the effect of those resolutions, the one in 1912 having to do with the declaring of the first 50,000 shares, that were paid up for the conveyance of certain lands and water rights by the [1311] promoters to the corporation, and the other in 1915 declaring that the whole 100,000 shares had been paid up, or in effect saying that another 50,000 shares had been paid up by services rendered by the Fleishacker's and their assistants, and so forth, in getting the company organized and under way, leave a lot to be desired from the standpoint of any sort of intelligent or proper corporate records.

As a matter of fact, it developed sometime many years afterwards, when the entire management and ownership of the controlling stock had passed into other hands, that the recital of the 1912 resolution, which indicated that the consideration in part was the conveyance of property and water rights, was certainly ambiguous, if not a misrepresentation of fact, for the reason that the property and water rights which the company acquired, were paid for by cash out of the company's treasury, or the people who had advanced the money for that purpose were reimbursed in cash out of the company's treasury, so that the part of the first resolution that might be said to have truth or accuracy, was merely the part that had to do with the services that were being performed, and the implication, if it is in there, of credit services that were rendered by the Fleishacker's in arranging the finance-

ing of those things, but the actual payment for those lands—there can be no question about that, and I don't want any member of the Commission to have any doubt as to what is our own position [1312]—there is no contention here that the company received any cash for any of this stock. There is no contention here that any physical property purchased or acquired by the company was paid for by any of its stock.

The contention is—and it is our very definite conviction—that the Fleishackers received these 100,000 shares of common stock for substantial services which they performed for the company during the period of pre-organization—that is, pre-operating stages of the company—and that they received no other compensation than what came to them through this stock.

By 1925 this common stock had been quite widely sold or distributed. The distribution came about largely through the Fleishackers making it available to the company when it sold its preferred stock and a very large part of these common shares got into the hands of the general public through their receiving a bonus of one share or two shares of common for subscribing for preferred stock and similarly with certain of the bonds.

In 1925 that stock was listed on the San Francisco Curb Exchange. I would say by the first of March 1925. In the twelve months prior to that time, the quotations on it ranged from something like 15 to 25, as I recall the testimony. The figure was

somewhere around 25 in the early part of 1925—$25 a share. [1313]

Mr. Priest: 34, I think, Mr. Laing, was it not?

Mr. Laing: I haven't got the figure right in front of me. I think I could find it in the briefs. I think that is correct. I think the figure did range as high as $34. It would be difficult to say what an average quotation for it was, but the fact is that not a great deal of the stock was bought and sold.

As of about the first of March, 1925, the American Power & Light Company bought the entire capital stock, the entire common stock of the Northwestern Electric Company, buying a big block of it from the Fleishackers who undertook to deliver approximately 60 percent of the stock.

They didn't own that much, themselves, but they and their immediate associates apparently held that much as a sort of a block, and the remainder of it was purchased from people who held it.

The exhibit which was put in this record on March 3, indicates there were some 490 owners of shares of common stock at that time. I cite that merely to show that the stock was looked upon as not a singly held control, but as an investment stock or a speculative stock, however you may choose to call it, which was widely dealt with on the market and widely distributed, and the actual transferors of the stock in the period following the first of March 1925, in the next few months during which the American acquired all of the [1314] shares—all but two or three that were bought a year or so later, there were 490 of them.

Now, the American Power & Light Company paid $50 a share for that stock. They had an investment, therefore, in the stock of something over $5,000,000, because there were certain expenditures incurred in connection with it.

In one or two cases, I think, there was something more than a bare $50 that was paid. In round figures the American Power & Light Company made an investment of $5,000,000 in that stock, and of course, the management immediately changed.

The former Fleishacker's and their associates resigned from their respective offices, a new board of trustees, as they were then called, was elected, and a new set of officers were elected.

Since the first of March, 1925, the property has been a subsidiary of the American Power & Light Company, with some $4,000,000 of preferred stock outstanding in the hands of the general public and these 100,000 shares of common stock held by the American Company.

Sometime after that—some years after that—a problem came up with respect to this stock. The problem came up in determining, in the first place, what the company had received for 100,000 shares of stock. It came up in an investigation by the Public Utilities Commission of Oregon.

That was the time when it was discovered that this [1315] first resolution, which seemed to say that the stock had been issued for land and water rights, that if it said that, that, if that is what it was intended to say, that that resolution was not true, that the money that those land and water

rights had been acquired with had actually been paid out of the treasury of the company or had been reimbursed to the Fleishackers.

That aspect of the matter was definitely a surprise, certainly to everyone connected with the company at the time—that is, the people, the officers, directors, who had come into the company after the American Power & Light Company acquired it in 1925.

Sometime shortly after that—I think that proceeding was in 1933—Mr. VanScoyoc was then with the Oregon Commission and will remember the circumstances.

The records that were carried on the company's books with respect to it—on the old records—were also rather vague with respect to it. One time they classed it on the subsidiary ledger as land and water rights $10,000,000, and the whole situation was a source of very definite embarrassment to the management of the company. I mean, the management that came in with the American Power & Light Company's acquisition of stock.

But in 1934 a stockholder's suit was brought against the Northwestern Company and the American Power & Light Company [1316] The suit was very definitely instigated by the man who at the time held the position of the Office of Public Utilities Commissioner of Oregon. An attorney residing in the State of Washington had his name on the pleadings, the attorney in Portland also. That was in the Allen case, and before the case was finished, the man who had been Public Utilities Commis-

sioner had his name in there as the record attorney in the case, Mr. Charles M. Thomas.

That suit was brought by the holders of some 20 or 30 shares of stock attacking the validity of the 100,000 shares of stock in the hands of the American Power & Light Company, alleging that the stock had been issued without consideration and demanding that the stock be cancelled or that American Company dig up $10,000,000 with various and sundry prayers for relief which were in some respects inconsistent with each other.

The defense of the American Power & Light Company in that suit was that they had bought the stock in the open market and paid value for it without any notice of any defect or anything to put them on notice that the stock had not been fully paid as it purported to be.

That defense in my opinion was a complete defense to any action in that suit, but the case dragged along on preliminary motions and on questions having to do with the jurisdiction of this State court over the non-resident American Power & Light Company and other things, until along about 1936, at which [1317] time, when the case was about ready to be set for trial, the plaintiff's attorneys made a motion to dispose of the case on the basis that if the stock of the company would be written down to an amount that seemed to represent—they agreed represented—its approximate value in assets, and after some negotiations, these steps were taken up and followed.

The American Power & Light Company agreed as part of the procedure and part of the stipulation for the dismissal of that suit, that it would consent to surrender its certificates for the 100,000 shares of $100 par value stock in exchange for certificates for a like number of shares of fully paid and non-assessable common stock with a par value of $25 per share provided the corporation and its stockholders would take appropriate steps to consummate the necessary changes in the capital structure.

A stockholders meeting was called, I think, and held on the 15th of September or 16th of September 1936, at which the notice of the meeting set forth that the purpose of the meeting was to consider and act upon the adoption of the following resolution, which set out in detail exactly what the proposal was, namely that the common stock be reduced from $10,000,000 to three and a half million, that the company accept the offer of the American Power & Light Company to surrender its 100,000 shares of stock of $100 par value and receive in lieu thereof, 100,000 [1318] shares of the fully paid and non-assessable $35 stock.

That meeting was held. All of the preferred stock of the Northwestern has voting power. I think there were some 4,000 stockholders, between three and four thousand, at the time, and a meeting was held at Vancouver, at which a very large number—quite a few stockholders at least, a relatively large number for that kind of meeting—were present in person and a very substantial part of the preferred stock was present by proxy.

That resolution was unanimously adopted.

Immediately the articles, necessary articles, of reduction of capital stock were filed and I think they are in evidence here as Exhibit No. 83 in this proceeding. They were filed with the Secretary of State of the State of Washington as required by law.

The certificates for the old $100 stock were surrendered by the American Company. New certificates, $35 stock, fully paid non-assessable, were delivered to the American Company in place of the stock that was surrendered.

In the meantime and as a necessary part of the proceedings, applications were made to the regulatory authorities in both Oregon and Washington, to the Public Utilities Commission of Oregon and the Department of Public Service of Washington for the State of Washington, for permission to issue these 100,000 shares of $25 stock, fully [1319] paid, non-assessable in lieu of the outstanding common stock.

Appropriate orders were issued by both of the regulatory bodies, authorizing that transaction. Each of these orders I think, contained a reservation that the respective authority, in passing upon it, was not undertaking to make any determination as to what the cost, what value the company had received for the stock, but the Commissions both felt the transaction was in the interests of the company and a very proper one to make at the time, and the transaction had their approval, subject as I say—there was not any qualification to the ap-

proval except that it was a disclaimer of having made any finding of either cost or value with respect to the consideration received by the company.

Sometime prior to that settlement in September of 1936, and as part of an undertaking which the management of the company was making on its own account—and would have made without the litigation, but was somewhat delayed by the litigation—was a proceeding on the part of the board of directors and the management, to determine what the assets of the company really were, what they were worth.

Previously, there had been appraisals made, but without any final determination. There had been a rather long drawn-out investigation, that proved abortive in the long run, because of changes of staff and differences of opinion on various things, by the Public Utilities Commission of Oregon, but [1320] there had been no final order of valuation made, but the company, through a staff of engineers headed by Mr. E. C. Willard, had made a most exhaustive inventory of every piece of property that the company owned.

That was made originally as of 1933, I believe, or '34. I think, perhaps, the first valuation was made as of December 31, 1932, and Mr. Willard was asked to analyze the valuation he had made in the light of the conditions of the property and the additions and subtractions, and so forth, since that time, to determine, as of December 31st of the year, 1935, the fair value of the company's assets.

He made a report to the management which the

board of directors adopted as a basis for determining that the assets of the company were very—put it this way, that if the common stock were reduced by six and a half million dollars to the three and a half million dollars, which would be the effect of reducing the par value to $35 a share, that the asset side of the company's balance sheet would properly show—and at the same time, six and a half million dollars were credited or plant value was reduced by that much,—that the actual values of the company's property as then reflected on the balance sheet would be substantially in excess of an amount necessary to balance the liabilities accounts, including the surplus accounts and the reserve accounts, and so forth, and it was on the basis of that determination made by the [1321] management, by the board of directors, following this exhaustive careful study made by Mr. Willard, that the management felt justified in proceeding with this plan of reducing the capital stock, and the feeling then that the balance sheet was in fine, respectable shape, that it represented honestly values that were there in th property, and that such problems as had arisen previously with respect to it, had been eliminated.

Now, that is the history of the 100,000 shares of stock, how it came to be $35 a share, and what the officers of the company had attempted to do with respect to it.

Now, when we came to the hearing on March 3, on the rehearing in this case.

Commissioner Scott: May I ask you a question?

Did either the Oregon or Washington Commission at the time there was a reduction in the amount of the value of capital stock from $100 to $35 indicate what the consideration for the stock was?

Mr. Laing: As I said, Mr. Commissioner, their order contained what you might call a disclaimer of having made any determination or finding. Now, I haven't got those orders here.

Mr. Slaff: I don't have them here.

Commissioner Scott: As you were telling us before, as a matter of history——

Mr. Laing: (Interposing) The statement in the order [1322] was to the effect that, "Nothing herein contained is to be taken as a finding on the part of the Commission that the company had received value or the cost of the property represented by this stock."

Now I think that was, in effect, what they said.

Commissioner Scott: In other words, may we not infer that they clearly refrained from passing upon the validity of that phase of the issuance?

Mr. Laing: They didn't refrain from passing on the validity of the issuance, but they did refrain from anything that could be construed as a representation that they had found that the company had received value for it.

Commissioner Scott: Any consideration?

Mr. Laing: Yes, sir. In fact, the application, Mr. Commissioner, that was made to the two Commissions for the authorization of that transaction, carried with it the same sort of provision.

That is the application which I myself prepared, carried with it *no* recital that they were not asked to pass, and that their findings authorizing the transaction would not be taken, was not to be taken as a determination of value or cost in either case.

Commissioner Scott: Is it your position now that the consideration arose out of the services of the Fleishackers or some of their antecedents at the time the company was organized [1323] that gives these securities particular value, or that a value grew out of some water rights.

Mr. Laing: It is my position, Mr. Commissioner, that there was a consideration received by the company for the issuance of the stock. That consideration, I am frank to say, was relatively small as compared with the $10,000,000.

Commissioner Scott: How much consideration?

Mr. Laing: The company's own officers had appraised the cash value of those services, had they been paid for in cash, at $400,000.

Commissioner Scott: For that sum there was issued $10,000,000 worth of stock?

Mr. Laing: For that they got 100,000 shares of stock.

Commissioner Scott: You don't argue now that that is a valid consideration for those securities, do you?

Mr. Laing: I would say this, Mr. Commissioner, that if that stock was today in the hands of the men to whom it was originally issued that there would be a very serious question about the whole transaction.

Commissioner Scott: Then the insulating device is the alienation or transfer of these securities into the hands of someone else that gives it value?

Mr. Laing: I don't like to use the word "device" if it implies that anybody did it with the deliberate idea——

Commissioner Scott: (Interposing) Just change the word [1324] "device." The transfer into the hands of a third party gives the securities a value which you admit it didn't have?

Mr. Laing: I would say this, that the transfer of the securities to a purchaser for value without notice gave these securities a legal status as paid up stock.

Commissioner Scott: How about a factual basis of value?

Mr. Laing: It could not, of course, make any difference in the value because the value at all times depended on what there was in the way of value of the assets behind that stock.

Now that value, as in any case, might be considerably more or less than what was paid for it. I mean, it is quite conceivable that the Fleishackers or any other stock promoter might have gone out and paid $100,000 for a piece of property, and taken $100,000 worth of stock for it and that property, because of changes in fashions or something else, might have become worthless, so that the stock value from that standpoint, thinking of it as value, might be negligible, in spite of the fact that $100,000 had been put into it, but my position on behalf of

the company now—and has been since 1925—that the value of that 100,000 shares of stock depends on the full value of the assets of the company, after charging against those assets all of the prior securities and the surplus.

Commissioner Scott: Even though it had no consideration back of it at the time of issuance? [1325]

Mr. Laing: Even though it cost, we will say, only a five cent piece in 1911. I mean from the standpoint of value now as distinguished from cost, I don't think there can be any serious question about that either as a legal or as an economic concept. That is our position with respect to it.

Now, when we came to this hearing the third of March, the Commission had previously indicated, I think, fairly clearly, that its conception of its duty under this accounting system, having found that there was an inflationary item in the books of the company in this case to the extent of three and a half million dollars, in an account which was ordered to be put in account 107, that it was the duty of the Commission to order that disposed of, and re-hearing, as the Chairman has stated, was held—was held solely for the purpose of considering a plan of disposition of that three and a half million dollars.

Our position was then—and was made clear to the Commission at the time, and if there was any suggestion in our letter that may have been too abrupt, so as to have caused the wrong impression,

I certainly regret that, because we felt that the only disposition that could be made of that three and a half million dollars, assuming that it was to go in account 107, was that it should be retained there, because it reflected value in the assets of the company in excess of the other liabilities. [1326]

Now, an application was filed with this Commission on the 30th of January for a continuance and for a change in the place of hearing. That application contained this paragraph, "The company has been advised by counsel for the Commission that the Commission considers that evidence with respect to, "A" the present fair value of the company's property, "B" the fair value of the company's property in 1925 when the stock was acquired by the American, or "C" the fair value of the company's property in 1936 when the par value was reduced to $35 per share, is within the prohibition of the proviso contained in paragraph (a) of the Commission's order of January 21, and thus will be neither relevant nor material in the issue in such re-hearing, and that the examiner, who will conduct such re-hearing, will refuse to consider any such evidence."

That was our understanding, frankly, at the time, and we could appreciate that point of view, because it had been made fairly clear by the Commsision's recital and the Commission's order granting a re-hearing, and by the recital of the Commission's order allowing the American Company to intervene, that the Commission was concerned solely with what it regarded as original cost.

It did not regard the question of present value as having any bearing on the matter, and consequently that testimony as to value would not be regarded as either relevant or material. [1327]

Consequently, when we got to this hearing in Portland—and I want to say I was very grateful to the Commission for making it possible to hold that hearing in Portland instead of having to come here—we offered certain evidence which in our judgment was relevant to the question of the value of the entire assets as against the outstanding securities.

We offered evidence of the earnings accruing for the benefit of the common stock for the years 1921 to 1940 inclusive. That testimony was rejected on objection of counsel for the Commission, and by ruling of the Examiner, on the ground that evidence of value was immaterial.

We offered an exhibit which showed that the company's kilowatt-hour rates for residential service were extremely low and had been low over this whole period.

That exhibit was also rejected on the ground that it had no bearing on the matter, our point being that it showed the company was making these good earnings through the operation of a company that was furnishing service at very low rates. In other words, that they were not accumulating satisfactory earnings by merely high charges.

We offered another exhibit to show that the company's kilowatt-hour record of consumption was one

of the very best in the country so far as a gradual enlargement of that consumption. [1328]

Then we offered the testimony of Mr. Willard, who after being qualified as a witness competent to make such an appraisal, and having testified as to his knowledge of the property and the appraisals he made as of 1932, also said that he had on the basis of his 1932 appraisals and subsequent studies and analyses of the books, made a determination of value as of March 1 or January 1, 1925 and then he had brought his 1932 appraisal down to 1936 as of the time when the stock was reduced in value—he had made a determination of the cost of reproduction, rather, as of the first of January 1941, the cost of reproduction less accrued depreciation.

His appraisal in each case was on that basis.

When we asked Mr. Willard if he would give the figures as to these appraisals as of those respective dates, an objection was made by counsel and the objection, of course, sustained.

If there were more time, I think it might be of interest to read some of the passages of the discussion between counsel for the Northwestern and the American respectively, and the Examiner, and counsel Mr. Slaff.

For a time there was some indication that the Examiner was disposed to make a distinction between an estimate of value made as of January 1, 1925 and the current estimates of value, the

Examiner feeling that possibly *their* might be some difference in the situation created by the creation of [1329] the American's status as stockholder at that time.

The Examiner was very definite and spent no time in arguing about the objection, over the objection, as to the January 1941 valuation, although from the standpoint that I presented it, and in my own mind, I felt then, and still feel, that the more nearly up to date the determination of value is, or that evidence of that value is, the more useful and satisfactory the evidence as to the current value of the property, but all of that evidence was rejected on the ground that value was immaterial, and then some other additional evidence was offered on behalf of the American Power & Light Company, evidence as to this 1936 change in the capital stock, in the form of stock certificate that was issued at that time and the settlement or final decree in the Allen case, a part of it was read into the record. Mr. Slaff took the position at that time that it was not material for the reason that the title of the American Power & Light Company to its 100,000 shares of stock, was not being challenged in these proceedings, that the only issue in the proceedings was, as they have been narrowed down at the present time, was what was to be done with the three and a half million dollars in account 107, and if we had no plan of disposition to offer for that three and a half million dollars, then there was nothing further to argue about in the proceeding.

As I made clear in the discussion during the record, [1330] our only plan of disposition, if you want to call it that, was one of indisposition to do anything about it. In other words, our plan of disposition was a plan of retention, of keeping that there, which is our position now, that that is an asset, that there are assets that we value on the asset side of the balance sheet to match the liabilities, including the three and a half million dollars that is on the other side.

Now, Mr. Priest is going to discuss in more detail, the legal aspects of this question of the authority of the Commission or the right of the Commission, in the first place, to undertake to go beyond the classifying of accounts and the classifying of charges and direct us to do something more than that.

He will also discuss the propriety from the standpoint of the adjudicated cases, of recognizing values and its significance, when any such consideration is being given to the problem.

Inasmuch as the legal aspects of the matter that he is concerned with, that he will discuss in detail, affect both the American Power & Light Company interest, as intervening stockholder he represents, and the Northwestern, as Mr. Priest has been in this case from the beginning, as associate counsel for the Northwestern, I am going to leave the discussion of those questions entirely to him. Thank you very much. [1331]

ARGUMENT OF A. J. G. PRIEST:

Mr. Priest: If the Commission please, Mr. Laing and I, in discussing our problem, felt that our further argument in this matter might perhaps follow the objections that were urged at the March 3 hearing on behalf of American Power & Light Company and also, except for two of them objections, 6 and 8, in which the Northwestern Electric Company did not join, also urged on behalf of Northwestern Electric Company.

The third and first of these objections was: No. 3: That the company was subject to comprehensive regulation by the States of Washington and Oregon as to accounting rates, adequacy of service, security issues, property acquisitions and dispositions, contracts with affiliated interests, and every other aspect of its business which concerns the general public, and that the authority of the Federal Power Commission is limited by the Federal Power Act to such matters as are not subject to regulation by the states and therefore does not comprehend any such disposition. And a second and allied objection: That the Federal Power Act does not invest this Commission with authority or control over the general corporate and other fundamental accounts and records of that company.

These two objections were urged at some length in the briefs previously filed in this matter and, therefore, perhaps no purpose would be served by urging them further. [1332]

However, they are basic background material

for our further objections, and I therefore refer to them in that connection: The second, fourth, and fifth objections which were urged on behalf of the Respondents, were these.

2. That the Federal Power Act does not authorize said Commission to require any disposition of said amount of $3,500,000 and that said Commission in and by this proceeding, is attempting to exercise powers which were not granted to it by any law. 4: That any such requirement of disposition is based upon a retrospective application of the Federal Power Act, which is not provided for by the terms thereof, and which ignores the property and property rights acquired by the parties to this proceeding, particularly by the American Power & Light Company, prior to enactment of parts II and III of the Federal Power Act.

5. That in and by this proceeding the Commission attempts to exercise judicial powers which are granted only to the courts of the several states —and I should add parenthetically, to the federal courts—and to determine contract rights and liabilities of the company and its stockholders or to construe and enforce laws of the states which are subject to enforcement only in the courts thereof.

I think that our position with respect to the objections that I have just read may very well be summarized by observing, [1333] with the utmost deference that what the Commission is proposing is, in essence, legislation by administrative fiat.

We submit, that, building upon the express and essentially limited powers granted to the Commission by Section 301 of the Act, the Commission is conferring upon itself authority which the Congress could not conceivably have intended to confer.

I would like—if I may—to attempt to rewrite Section 301(a) of the Act to enact the administrative legislation by which this Commission is apparently proposing to enlarge its powers.

If what seem to us to be the Commission's contentions are sound, and if they are sustained by the courts, there will have been added to Section 301(a) of the Act a provision that will read substantially as follows:—this is the amendment that it seems to us is proposed, Mr. Chairman—and incidentally, in this connection, perhaps it would be just as well to read that portion of Section 301 (a), which immediately precedes my suggested amendment.

"The Commission may prescribe a system of accounts—" I am reading now from the——

Commissioner Scott (Interposing): Is this the reconstructed Act you are reading from?

Mr. Priest: No, sir, I am reading from the Act, itself, Mr. Commissioner. I shall add my reconstruction in just a [1334] moment, sir, if I may.

This is the second sentence, beginning with the second sentence of Section 301.

"The Commission may prescribe a system of accounts to be kept by licensees and public utilities and may classify such licensees and public utili-

tion and prescribe a system of accounts for each class. The Commission, after notice and opportunity for hearing, may determine by order the accounts in which particular outlay and receipts shall be entered, charged, or credited. The burden of proof to justify every accounting entry questioned by the Commission shall be on the person making, authorizing, or requiring such entry, and the Commission may suspend a charge or credit pending submission of satisfactory proof in support thereof."

That is the Act. I now offer my suggested enlargement of the Act.

"The Commission may require licensees and public utilities either retroactively or otherwise, to effect such accounting transactions and to make such accounting entries as the Commission shall deem appropriate in the exercise of its jurisdiction under this section.

"In requiring particular accounts to be debited or credited, the Commission may disregard the present fair value of any property, whether tangible or intangible, represented by any asset account, and may require such account to be written [1335] off by debits to surplus, or otherwise amortized, or disposed of.

"For the purpose of effecting the amortization or other disposition of a particular account, the Commission may require any licensee or public utility to refrain from the payment of dividends upon any class or classes of capital stock until such

account shall have been so amortized or disposed of."

I respectfully submit that anyone who was familiar with the Congressional hearings that immediately preceded the enactment of the Public Utility Act of 1935 would say that Congress, even in 1935, would not have been likely to enact such a provision as the one that I have just read, nor do I believe that, if that provision were in the law, that we should have any particular difficulty in persuading the courts to strike it down as violative of the due process clause contained in the Fifth Amendment.

Commissioner Manly: Do you think that might probably be called the gospel, according to Priest, as rewritten?

Mr. Priest: Well, as an unfrocked Priest, Commissioner Manly, a completely unfrocked Priest, although speaking from a pulpit I do not intend to offer the Gospel according to Priest, but rather what I conceive to be the Gospel according to the Commission, sir.

Commissioner Scott: The sum of your argument is this, isn't it, Mr. Priest, that while we can require you to [1336] reclassify, we can't require you to write out of your accounts those things which may be inflationary and may not be properly there, that we simply perform some function in vacuo, and regardless of the effect that retention in your accounts may have on consumer rates, et cetera, that we neither have the statutory power nor

has Congress the constitutional power to require you to take them out of your accounts.

Mr. Priest: I shall develop my argument along those lines as I proceed.

Commissioner Scott: Is that your argument?

Mr. Priest: Not entirely. If you will be patient with me, I shall endeavor to develop my argument as I go along. Let me state my position in essence is this, that where there are values in an asset account as measured by the usual criteria of value, that this Commission may not lawfully require such values to be written off, or otherwise disposed of.

Commissioner Scott: And although an account or an item is suspended and the burden is on the respondent to sustain it on suspension and there may be a failure of proof, we still do not have either statutory or constitutional power to require that item to be taken out of your accounts.

Mr. Priest: I am not assuming that there is a failure of proof.

Commissioner Scott: As a hypothetical case, then, your [1337] argument must include that, must it not?

Mr. Priest: Not necessarily.

Commissioner Scott: That there is a failure or want of power, lack of authority?

Mr. Priest: A lack of authority to interfere actively with what we conceive to be vested rights. I shall develop that further, if I may, please.

The Chairman: In your prior answer to Com-

missioner Scott, you stated that it was your position that there were assets of value—I think you said in accordance with the usual concepts of value—the Commission may not order them written off.

Mr. Priest: Retroactively, perhaps I should have added.

The Chairman: I presume that the implication of that is that, if there is no evidence of value in these assets, that the Commission might order them written off retroactively.

Mr. Priest: Where there is no evidence of value whatever, as measured by any of the standard criteria of value, perhaps that follows, Mr. Chairman.

The Chairman: Well in other words, then, ultimately the courts or the Supreme Court would determine what would be conceived of as the evidence of value.

Mr. Priest: Yes, but I shall develop another aspect of that particular argument as I go along.

Commissioner Scott: And if there were no value, that might [1338] be done retroactively might it not?

Mr. Priest: Perhaps it might, as a correction. I don't think that is in this case, Mr. Scott. Perhaps that might be done by way of a correction of a clear and ostensible patent accounting error, but I think that that question is not in this case, sir.

Commissioner Manly: What do you mean by retroactively? Do you mean that after an entry has once been placed on the books by you, that it can't be changed tomorrow or next week by this Commission or one minute after it has been entered?

Mr. Priest: Where vested rights, Mr. Manly, are affected——

Commissioner Manly (Interposing): When does the vested right accrue under your theory, a year after or ten years after or——

Mr. Priest (Interposing): I think that in this case vested rights have accrued prior to the adoption of Parts II and III of the Federal Power Act and I will get to that in just a moment, if I may, please, sir.

Commissioner Manly: I wish you would devote a little thought to that matter of "retroactively" and tell us just what you mean by "retroactively."

Mr. Priest: I shall, indeed, sir. I had understood from the testimony that was submitted by Mr. Smith at July 1940 hearings, that any amounts in account 107 were definitely required to be written off. [1339]

Now, Mr. Smith, I wish you would correct me if I am wrong, because I don't wish to misquote you. My recollection is that you made a distinction between account 1005 and account 107, in that connection. It therefore seems to me, if the Commission please, that the distinguishing of the case of the Edison against Maltbie, the New York case with

which we are all familiar, which was made by Mr. Justice Cardoza in the American Telephone & Telegraph case, is not applicable to this situation.

You will recall that Mr. Justice Cardoza said, "The case,"—that is the telephone case—"in that respect is sharply distinguished from New York Edison Company against Maltbie, where, under rules prescribed by the Public Service Commission of New York there was an inflexible requirement that an account similar in some respects to account 100.4, which is analogous, as I understand it, to account 100.5, and perhaps account 107 in your classification, be written off in its entirety of surplus, whether the value there recorded was genuine or false.

That is, that there was an inflexible requirement, that an amount in this particular account be written off entirely out of surplus, whether the value there recorded was genuine or false.

I understood Mr. Smith's position at the hearings in July, 1940, to be that that is the requirement here, that is, that [1340] any amount in account 107 is inflexibly required to be written off.

In this connection I respectfully direct the Commission's attention to the following quotation from the Goodrich case cited with approval by Mr. Justice Cardoza in the A. T. and T. decision. "The object of requiring such accounts to be kept in a uniform way and to be open to the inspection of the Commission is not to be able to regulate the affairs of the corporations not within its jurisdiction, but to be informed concerning the business methods of

the corporation subject to the Act, that it may properly regulate such matters as are really within its jurisdiction."

Another quotation from Mr. Justice Cardoza, which I think was cited in our original briefs in this case, "The Commission is not," that is, by reason of the interpretation placed on account 100.4 by the Communications Commission, "The Commission is not under a duty to write off the whole or any balance in accounts 100.4, if the difference between original and present cost is a true incremental value."

Now I understand that that is not the position here but that the Commission conceives itself under a duty to write off the whole or any part of any balance, any black balance I should say, in account 107, whether or not the difference between original and present cost is a true incremental value. [1341]

Perhaps I need not make further reference to the New York decisions with which I am sure you are familiar—I am referring particularly to the Lockport decision, the Iroquois Gas decision, and, of course, the Maltbie decision, that is the New York Edison Co. against Maltbie, but perhaps the Commission's attention has not been directed to a decision of the New Jersey Supreme Court in the case of Passaic Consolidated Water Company, against the Board of Public Utility Commissioners.

That was a rate and consolidation proceeding in which the Commissioners fixed the value of the used and useful properties of the companies at $11,500,000, and directed that the books should be

opened on this basis. That is the $11,500,000 basis.

This was done, but after an appraisal, the company set up as its fixed capital on this appraisal basis, the amount of $20,209,000.

The prosecutor, that is, the companies allege—the Board of Commissioners, I should say, allege that it has in no way sought to use—I beg your pardon, it is the company I am referring to as prosecutor.

The prosecutor, that is the company, alleges that it has in no way sought to use the higher valuation in connection with the rates charged or properly chargeable by it, or as the basis for the issuance of securities, or in any other matters over which the Board has jurisdiction or supervision [1342] that it claims the right to enter its assets on its records at their fair value; and that it cannot be lawfully compelled to enter them at a substantially less value arbitrarily fixed by the board.

Among other things it owes to its stockholders certain rights that may require an entry upon its books of what it determines to be the fair value of its property. I am eliding as I go along. That in the events of sale of any of the company's property for which it has no longer use, there should be a record of the true value of such property.

The court also refers to what it states is the well-settled rule, that when bodies are created for the regulation of utility companies, the presumption is that the power of regulation conferred does not extend beyond the express terms of the grant, and

thein says finally, "It may well be that a board could require an entry upon the books of a utility to the effect that on such and such a date; the valuation for rate-making purposes was found by the board to be a specific amount, but the order in the present case goes beyond that and is a prohibition that there shall not be set up on the books of the company for any purpose whatsoever any different basis of fixed capital than that which has been approved by the board for rate-making purposes.

"This, we feel, transcends the power of the board."

The Chairman: Do you draw the inference from that, that a utility company would have full latitude in placing on [1343] the books anything that its management or its directors or its promoters chose, for the purposes of its books, to consider value.

Is there any limitation on what they could put on their books, if they chose?

Mr. Priest: I think, Mr. Chairman—I don't conceive that that is the situation here—but I think, sir—I mean, assuming your hypothetical case, sir—I think that the board of directors of a public utility company could place upon its books asset values which, in the opinion of the directors of the company, properly reflected the value of such asset accounts based upon the orthodox, the accepted criteria of values.

Of course, I think no such valuation could be placed arbitrarily. I think it would have to be supported by genuine values.

The Chairman: Who would interfere? Supposing that the directors did choose to put some value on the books that might not, according to certain theories, be capable of being sustained, who would have the authority to keep such values off the books?

Mr. Priest: I think that, as the Court indicates here, that the regulatory authority might very well require that a full and complete disclosure be made, and that if original cost were indeed substantially lower than the figure—[1344] original cost as one of the criteria of value—were indeed substantially lower than the figure at which the asset account was placed on the left hand side of the company's balance sheet that a disclosure of that fact might be well made.

The Chairman: A disclosure, but, as far as the company's books were concerned, the total assets which the company chose to claim, irrespective of what accounts they were placed in, would be solely within the discretion of the company?

Mr. Priest: If there was genuine support for those values on the basis of the orthodox criteria of value.

The Chairman: But who is to interpret those orthodox criteria of value? How does the company rewrite the books, if the assets don't conform with those orthodox criteria of value.

Mr. Priest: It may very well be that, in an appropriate proceeding, that a regulatory authority could require a restatement — this is substantially the same answer that I gave Commissioner Scott a

moment ago—might require a restatement on the basis of the accepted criteria of value, so as to correct an arbitrary and a capricious statement of assets arrived at by directors' or stockholders' action?

The Chairman: Supposing that the assets, which the directors chose to place on the books, were related to a capitalization of earnings, would that be a legitimate basis for being interfered with by regulatory bodies?

Mr. Priest: I think it might well be, Mr. Chairman. I [1345] understand capitalization of earnings not to be an appropriate basis for the fixing of public utility asset values.

The Chairman: But occasionally it creeps in, in just such figures as this $3,500,000 that we are talking about?

Mr. Priest: Have I answered your question?

Commissioner Scott: Did I understand you to say a while ago, that this is within the American Telephone & Telegraph case or Maltbie decision, your position here?

Mr. Priest: This is within the Maltbie decision.

Commissioner Scott: Within the Maltbie decision?

Mr. Priest: Yes, sir.

Commissioner Scott: Because it is inflexible and positive and doesn't give you any opportunity to have the Commission consider any values if there are any there?

Mr. Priest: That is right.

Commissioner Scott: Now didn't Mr. Justice

Cardoza distinguish the Maltbie case in the American Telephone and Telegraph.

Mr. Priest: He did distinguish it, Mr. Scott. I don't know whether you were here when I addressed myself to this particular argument. I am attempting to remove this situation from Mr. Justice Cardozo's distinction of the Maltbie case.

Commissioner Scott: Didn't that distinction turn on the question as to whether the claimed value was in fact fictitious, false, or actual? [1346]

Mr. Priest: No. Shall I read the language again?

Commissioner Scott: I am familiar with the case, I am asking you if that isn't the thought?

Mr. Priest: I am sure you are.

Commissioner Scott: Isn't that the point of distinction between them?

Mr. Priest: No. I think the point of distinction turned upon the inflexible character of the requirement that the amount in the plant adjustment account be written off.

Commissioner Scott: Yes, but he distinguished the Maltbie case when he said there was an inflexible requirement there and then went on to say, did he not, that it didn't take into consideration the question of whether it was a general or false type.

In other words, the whole balance there was confiscated.

Mr. Priest: I don't think so.

Commissioner Scott: You claim you have property?

Mr. Priest: That is right.

Commissioner Scott: You claim it has a value. Then the question is, do we have the right to wipe it off, in the constitutional sense, or are you entitled to submit evidence to prove the value of that property?

Mr. Priest: That is a part of the question.

Commissioner Scott: To get to the point, the question is to weigh that testimony. Someone must weigh that testi- [1347] mony. The Congress has said this Commission must weigh it.

Mr. Priest: May I interrupt just a minute, please, sir?

Commissioner Scott: Yes, sir.

Mr. Priest: I am going to address myself to that particular argument in just a moment. I am coming to that next.

Commissioner Scott: Don't we get then to the narrow factual question of whether, having weighed it, we have decided or we will, if we do—that, upon the record, your claim may be fictitious, it may be false, so there is no underlying value. Therefore you are in the American Telephone & Telegraph case and under the statutory direction we have the power—not only the power, but the duty, and that was the purpose of setting up the uniform system of accounting to expunge from the record what does not have real actual underlying value.

Mr. Priest: We contend that we have here, and there underlying value, is an aspect of that question to which I expect to address myself in just a

Commissioner Scott: Go right ahead.

Mr. Priest: Of course, administrative agencies may make some findings of fact without being held to be exercising true judicial powers, but we submit that those quasi-judicial powers are now all-inclusive. For example, the Supreme Court in the case of Prentis v. Atlantic Coast Line Co., 211 U. S. 210, 53 L. ed. 150, made the frequently quoted statement at 53 L. ed. 158:

"A judicial inquiry investigates, declares, and enforces [1348] liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end.

"Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power.

"The establishment of a rate is the making of a rule for the future, and therefore is an act legislative, not judicial in kind.

"The effect of the inquiry, and of the decision upon it, is determined by the nature of the act to which the inquiry and decision lead up. The nature of the final act determines the nature of the previous inquiry."

There are other cases along similar lines with which I am sure the Commission is familiar. However, I think it is a well established rule that legislation, whether of Congress or of the States, cannot constitutionally make the determination of an administrative body binding and conclusive in a mat-

ter involving a constitutional question or a fundamental or jurisdictional question of fact, and take away the rights of an individual to the independent judgment of a court, as to both the fact and the law in the matter. Where such rights are at issue—and I believe they are here—before an administrative body, the party possessing such rights is entitled to at least an independent judicial review of the determination [1349] of that body as to both facts and law, and, if the statute creating the administrative body does not provide for such a judicial hearing, it is unconstitutional.

In the case of Crowell against Benson, that is U. S. 285, U. S. 22, the court cites with approval—I can read either from the decision or from my notes, if the Commission prefers.

The Chairman: Your notes.

Mr. Priest: The court cites with approval the following quotation from the case of Murray against Hoboken Land and Improvement Company. That is an older case, that is 18 How.

"To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider Congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which from its nature, is not a subject for judicial determination."

And the case goes on to hold that Congress may not oust the courts of their jurisdiction to indepen-

dently pass upon the fundamental or jurisdictional facts or questions involving constitutional rights. That is on page 54 of the Standard edition.

"What has been said thus far relates to the determination of claims of employees within the purview of the Act. A different question is presented where the determinations of [1350] fact are fundamental or 'jurisdictional,' in the sense that their existence is a condition precedent to the operation of the statutory scheme."

Then again at page 56: "In relation to these basic facts," and the basic fact here is, as I think the Chairman and Mr. Scott have indicated, the basic fact here is whether or not there are asset values on the left hand side of this company's balance sheet; as measured by the usual criteria of value to support its capital structure; that, we conceive to be the basic fact here.

To quote again: "In relation to these basic facts, the question is not the ordinary one as to the propriety of provision for administrative determinations. Nor have we simply the question of due process in relation to notice and hearing.

"It is rather a question of the appropriate maintenance of the Federal judicial power in requiring the observance of constitutional restrictions.

"The recognition of the utility and convenience of administrative agencies for the investigation and finding of facts within their proper province, and the support of their authorized action, does not require the conclusion that there is no limitation of

their use, and that the Congress could completely oust the courts of all determinations of fact by vesting the authority to make them with finality in its own instrumentalities or in the Executive Department. [1351]

"That would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law."

This decision, I should say, is the decision of the present Chief Justice.

Commissioner Scott: It doesn't mean to distinguish the application of the principle which you now argue for in the case of private rights as against those that involve public rights and the rights of the government to exercise regulation?

Mr. Priest: I think not, sir, and I am about to read a quotation from the decision which I think answers that question. This is from page 60 of the decision.

The Chairman: I would just like to make sure what you consider the purport of that quotation you just read.

Mr. Priest: The purport of that quotation is this, if the Commission please: That it was not the intention of Congress to confer upon this Commission the power to make fundamental findings of fact, findings with respect to fundamental or juris-

dictional facts, affecting vested rights, without there having been provided in the statute independent judicial review of the Commission's findings with respect to [1352] those facts, and that, there having been no such provision for independent judicial review of your findings as to facts in the Federal Power Act, that if that construction is required to be placed upon the Act that the Act is unconstitutional.

The Chairman: Then there is no limitation on the recourse to review according to you?

Mr. Priest: Yes there is, Mr. Chairman, because your findings of fact, if supported by substantial evidence are conclusive and I submit that that does not provide, that that provision is not a provision, for independent judicial review both as to facts and as to law.

However, let me proceed, in response to Mr. Scott's question, which is a very proper one.

"In cases brought to enforce constitutional rights, the judicial power of the United States," I am quoting again from the decision of course, "necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function.

"The case of confiscation is illustrative, the ultimate conclusion almost invariably depending upon the decisions of questions of fact.

"This court has held the owner to be entitled to a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own

independent judgment as to both law and facts.'" [1353]

The court cites, in that connection, a number of utility decisions. The familiar case of Ohio Valley Water Company against Ben Avon Borough; the case of Prendergast against the New York Telephone Company, 262 U. S. and other similar decisions.

Then the court says: "In the present instance, the argument that the Congress has constituted the deputy commissioner a fact-finding tribunal is unavailing, as the contention makes the untenable assumption that the constitutional courts may be deprived in all cases of the determination of facts upon evidence even though a constitutional right may be involved.

"Reference is also made to the power of the Congress to change the procedure in courts of admiralty," and so on. "But when fundamental rights are in question, this Court has repeatedly emphasized 'the difference in security of judicial over administrative action.'"

Then in the Ben Avon Borough case, where of course, an order fixing maximum rates for a water company was attacked on the ground that it violated due process of law, as depriving the water company of judicial review. The court in sustaining that contention said:

"In all such cases, if the owner claims confiscation of his property will result, the State must provide a fair opportunity for submitting that issue to

a judicial tribunal as to both law and facts; otherwise the order is void because [1354] in conflict with the due process clause, Fourteenth Amendment," and, of course, similarly the due process clause of the Fifth Amendment.

Commissioner Scott: Aren't you then in a position, if the point you are contending for is tenable, aren't you then protected, disregarding this Commission and seeking your remedy in a suit de novo in some district court to enjoin that order?

Mr. Priest: We may be.

Commissioner Scott: Isn't that what you are?

Mr. Priest: We may be, Mr. Scott, and that may be the remedy to which resort may be required to be had. None the less, sir, if I may just complete this—I beg your pardon—none the less, we feel that this Commission should not so construe its powers under the Act and that it should not, in this case, make fundamental jurisdictional findings of fact that affect vested rights and affect constitutional rights, properly asserted, as we conceive them to have been here.

Commissioner Scott: Were you reading from Crowell vs. Benson, there?

Mr. Priest: Sir?

Commissioner Scott: I say, were you reading a while ago from the opinion of Crowell vs. Benson?

Mr. Priest: Not just now. That was my statement, Mr. Scott. [1355]

Commissioner Scott: I would like to have that volume brought up here, if someone will.

Mr. Priest: I have it here.

Commissioner Scott: Do you have it there?

Mr. Priest: Yes, sir.

Commissioner Scott: May I look at it please, sir?

Mr. Priest: Certainly (handing).

Commissioner Scott: Thank you.

Mr. Priest: Again in the case of Louisville Bank against Radford—that is 295 U. S. 555—Mr. Justice Brandeis, when he was construing the so-called Frazier-Lemke Act of June 28, 1934, held that; although this Act was adopted pursuant to the broad bankruptcy power granted to Congress under the Constitution, the power therein granted must be exercised subject to the restrictions of the Fifth Amendment and that Congress may not take, for the benefit of the debtor, rights in specific property acquired by the creditor to the date of the Act.

Perhaps a detailed quotation from the Frazier-Lemke decision is unnecessary. It is substantially to the effect I have indicated.

Now this Act makes no provision for the payment of just compensation incident to the adoption of regulations for a system of accounting, for the very obvious reason that Congress, we submit, sir, did not contemplate the formulation of an [1356] accounting system which would permit the taking of private property.

The adoption of the original cost system as interpreted by the Commission, nevertheless, requires a re-accounting which may require the elimination

from the books of account of the very evidence upon which numerous property rights depend.

This is not merely interference with contract rights, subject to a paramount power and authority but is a direct taking of property and property rights.

It would seem clear, we think, from the authorities that we have cited, that to the extent that the system of accounts requires a write-off of any real value, there must be at least an independent judicial determination of the jurisdictional and fundamental fact as to whether the accounts represent the present fair value of the assets for otherwise there is a clear administrative taking of property rights valid and vested when the Act, under which the Commission purports to act was passed.

As I have already indicated, these rights were vested when the new powers, the enlarged powers were conferred upon this Commission by the Congress in 1935.

Failure to provide for an adequate judicial review of the facts and the law involved, and neglect to provide for the fixing and payment of just compensation incident to such a taking renders the accounting regulations and the Act, as [1357] apparently construed by this Commission, it seems to us unconstitutional.

Furthermore, it is extremely doubtful whether even a quasi-judicial authority subject to court review can be vested in an administrative body purporting to act under legislation granting jurisdiction to determine vested rights.

In other words, the judicial function appertains to determinations of past rights and the legislative function appertains to control and regulation of future rights and actions.

Just a brief quotation from Corpus Juris Secundum in that connection reading from Volume 16 of Corpus Juris Secundum on page 299.

"The distinction between the functions of the legislative and the judicial departments is that it is the province of the legislature to establish rules that shall regulate and govern in matters or transactions occurring subsequent to the legislative action." While the judiciary determines rights and obligations with reference to transactions that are past, or conditions that exist at the time of the exercise of judicial power, and the distinction is a vital one, and not subject to alteration or change either by legislative action or by judicial decrees.

If the Commission please, it is the retrospective, the retroactive character of the action already proposed to be [1358] taken with respect to the disposition of the $3,500,000 here in question, which seems to us to raise grave doubts and it seems to me that the recent decision of the Circuit Court of Appeals for the Seventh Circuit, in the Natural Gas Pipeline Company case, a decision handed down on April 14, 1941, in which this Commission was reversed on two points is significant.

This decision, it seems to us is particularly significant in its rejection of the contention of this Commission that the period during which the life of the

gas fields in the Natural Gas Pipeline Company case might be amortized, should begin with the beginning of operation of the company.

You will recall that the question as between the Commission and the company was that the Commission sought to use the longer period beginning with the beginning of operations of the company and the company sought to use the shorter period, beginning with the incidence, the application to the company of the Natural Gas Act of 1938, and the court said, "The position we take in nowise reflects upon the wisdom of the new legislation. That legislation looks to the future protection of the public. It deals with conditions which existed at the time the legislation was enacted.

"It neither gave, nor took away, value to going concerns whose lives were short and limited by fact conditions which neither the producer nor the consumer could change." [1359]

"For these reasons we conclude that the amortization period, for rate making purposes, should be 14 years instead of the period of 23 years adopted by the Commission."

That is, that the amortization should begin with the enactment of the Natural Gas Act of 1938.

Mr. Chairman, I have just had my tonsils taken out a few weeks ago and I would be grateful for just a brief recess.

The Chairman: How much would you like. Five minutes—is that all right?

Mr. Priest: Five minutes, if that is all right.

The Chairman: Five minutes recess.

(Whereupon a short recess was taken.) [1360]

The Chairman: We will resume.

Mr. Priest: Thank you very much, Mr. Chairman.

If the Commission please, I think I should refer to the specific powers, with respect to rates of depreciation, which are conferred upon the Commission by Section 302 of the Act.

This conferring of specific powers under Section 302 seems to us significant, as perhaps negativing the Congressional intent that more detailed powers, with respect to requiring accounting transaction to be effected along the lines of what Commissioner Manly referred to as the "Priest version" of Section 301, if the exercise of powers along those lines were to be conferred.

Objections 6 and 9 of the objections urged at the March 3 hearing were these:

6. That the rights of American Power & Light Company as the owner and holder of the common stock of the Company have heretofore been adjudicated and determined by state authority.

As Mr. Laing indicated this morning, we feel that the American Power & Light Company's title in and to the common stock of the Northwestern Electric Company has been quieted by action of a state court having jurisdiction in the premises.

Objection 9: Any order of the commission, requiring such disposition, invades the powers reserved to the states by Article X of the Amend-

ments to the Constitution of the United States and is contrary to law. [1361]

Then Objections 7, 8, and 10 were as follows:

7. That in and by this proceeding the Commission attempts to give effect to its findings and order dated December 6, 1940, directing the reclassification of the Company's accounts upon the basis of original cost, as such term is defined by the Commission, and the reclassification of said amount of $3,500,000 in Account 107 of the Commission's Uniform System of Accounts, and to require a disposition of said amount solely on the basis of the reclassification so directed to be made. Such reclassification does not provide a proper or any basis for the disposition of such amount for the following reasons:

a. That the Commission is not authorized by the Federal Power Act to require that the general corporate and fundamental accounts of the Company be kept on an original cost basis, as such term is defined by the Commission, or to employ such basis as the measure of amounts to be entered or retained in the accounts of the Company.

b. That the Commission is not authorized by the Act to require any such disposition if the assets of the Company have a value which fully supports its security structure and that said findings and reclassification order of December 6, 1940 failed to give consideration or recognition to the value of the property of the Company.

The Chairman: Is there any value other than

the value [1362] that can be sustained by what you can justify in the way of rates?

Mr. Priest: I am not sure that I understand the full purport of the question, sir.

The Chairman: What I mean is that, if you can not justify, before a regulatory body, rates which will produce earnings which will sustain a value, is there any value there?

Mr. Priest: Well, I think it clearly is true, Mr. Chairman, that rates, as such, have two limitations: On the lower side the confiscatory limitation and on the upper side the limitation of the value of the service, and if—well, take the case of the Street Railway, for example:

If a street railway company can not, on any rates of fare that can be approved by any regulatory authority, make earnings adequate to support its capital structure, I don't think there is any value in that capital structure. Does that answer the question?

The Chairman: If you are in a competitive situation, for instance, and a competitor could come in and make rates that you would have to meet, and those rates are so low that you couldn't secure any return on this particular element of value, which you are discussing——

Mr. Priest: (Interposing) Mr. Chairman, I have read some of your speeches along that line, and I am in thorough [1363] agreement with you, that the inexorable operation of economic laws would, in those circumstances, substantially impair

the value of the securities on the right-hand side of any such utility corporation's balance sheet.

The Chairman: All I am interested in is this matter of value that you are talking about, that concept that you have in mind of value, as related to earnings.

Mr. Priest: Earnings and other criteria, of course.

The Chairman: In the main related to earnings?

Mr. Priest: I wouldn't say that.

The Chairman: If you didn't get the earnings you would not have the value there.

Mr. Priest: No, we wouldn't, but I assume that, under proper regulation we would get the earnings.

"c. That the Commission is not authorized by the Act to determine the value of the property of the Company for the purpose of any such disposition and has no authority or jurisdiction whatever over the steam heat property of the Company, and that determinations of value for the purpose of controlling the general corporate and other fundamental accounts of the Company may be made only under authority of state law.

"d. That any such disposition is not a matter of accounting and involves determinations of value and matters of law, engineering and economics.

[1364]

e. Without waiver of the foregoing objections this intervenor further objects upon the ground that no order finally determining the plant account and other accounts of the Company has been made or entered."

Then, Objection No. 8:

"That, as found by the Commission in its opinion of December 6, 1940, a deposition of said amount of $3,500,000 'is the equivalent of obtaining ultimately from the holders of the common stock a consideration of $3,500,000 for the stock' and that American Power and Light Company, the present holder of such stock, acquired such stock from the holders thereof prior to the enactment of Parts II and III of the Federal Power Act and prior to the adoption by the Commission of its said Uniform System of Accounts, for value and without notice of any irregularity or lack of validity in the issuance thereof and free of any obligation to pay any additional amount therefor."

In other words, the Commission is requiring an enforced additional investment of $3,500,000 in the common stock of this company, for which American Power & Light Company has already paid five million.

That is, if the order is made effective, the American's investment in the common stock of the Northwestern Electric Company, instead of being five million, will be eight million five. [1365]

Then Objection 10:

"That any such disposition requires the writing off on Northwestern Electric Company's books and accounts of values inherent in its property and reflected in its present accounts and would thereby violate article V of the Amendments to the constitution of the United States and deprive the

Company, and American Power & Light Company as the holder of its common stock, of property without due process of law and take their property for public use, without just compensation."

Now, of course, one of the critical issues with which these respondents, and the whole electric industry are confronted, is the use which will be made of original cost figures, as ultimately required to be entered upon the books of account of public utilities and licensees.

If the orthodox criteria of value provided for in the celebrated case of Smyth vs. Ames are to be abandoned and, if original cost, as defined by this Commission is to become the sole criterion of value, then we think that not only will our property have been taken without due process of law, and not only will the decisions of the Supreme Court, from Smyth vs. Ames to the case of the Edison Company vs. Driscoll have been disregarded, but we also feel that a fundamental economic law will have been flouted.

For instance, James C. Bonbright, in his "Valuation of [1366] Property," which is a work with which I am sure all of you are familiar, says, and I quote:

"The accountant who enters the fixed assets of his company on the books at original cost, regardless of subsequent appreciation or depreciation, is valuing the property just as truly as is the appraiser who does his best to determine what he would call 'present value' as distinct from historical cost."

Since cost is not value but only is a single measure of value, and since it clearly is true that cost is an accurate measure of value only as of the time of payment and under the circumstances then prevailing, it seems obvious that only by coincidence would value established on the basis of original cost be the same as present value at some later date.

Cost, therefore, can be an appropriate criterion of value but it certainly is less significant, in a dynamic economy, than, let us say, the other elements of value enumerated in the case of Smyth v. Ames.

Now, it will be conceded, of course, that the failure of accounting to reflect value reasonably accurately is regrettable.

Indeed, one might join in the wish that a dollar of original cost on a company's books of account represented ultimate and unchanging value.

But this simply is not true and no amount of wishing will [1367] make it so.

And to assume or to insist that the facts are otherwise in order to simplify regulatory procedure or to make balance sheets more "truthful" is to indulge in dangerous rationalization.

Accounting, when carried on in accordance with accepted accounting principles, is widely recognized as having this fundamental limitation.

The Chairman: Are you still quoting Bonbright?

Mr. Priest: No. I beg your pardon. Bonbright ended with this phrase: "is valuing the property

just as truly as is the appraiser who does his best to determine what he would call 'present valtie' as distinct from historical cost."

That is the end of Bonbright.

The Chairman: You will probably recall——

Mr. Priest: The rest is Priest, Mr. Chairman, and perhaps highly unorthodox.

The Chairman: I think, perhaps, if you have studied Dr. Bonbright's book, you will recognize that, in dealing with this problem of valuation, as a practical element of social economy, he deals with it as various kinds of property: regulated property, utilities, and property involved in the normal processes of business that is not yet considered subject to regulation in the sense of the utility business.

[1368]

Mr. Priest: That is right.

The Chairman: I wonder if you recall the minority report that was filed by Dr. Bonbright, in cooperation with Frank Walsh, in connection with that Commission on revision of the Public Service Law in New York State, in which he went into this question of value from the point of view of utility regulation, and in which I think you will find that his view coincides very much more closely with the interpretation, that you feel is unjustified, of this accounting provision of the Federal Power Law, in accordance with the interpretation you are placing on it.

Mr. Priest: That may be so, Mr. Chairman. You are more familiar with that report, I am sure.

than I am, but I had understood the so-called Bonbright plan to be this—and I am quoting now from Page 151 of "Public Utility Regulation" by Wilson, Herring and Eutsler.

Is that the pronunciation?

The Chairman: I don't know.

Mr. Priest: You are familiar with the work, I am sure.

"The Bonbright Plan." This is their conception of the Bonbright Plan:

"Another method of public utility valuation for rate-making purposes was recommended to the New York Commission on Revision of the Public Service Commissions Law by Dr. James C. Bonbright of Columbia University, a member of the [1369] Commission.

"Dr. Bonbright proposed that the rate base should be determined for all utilities excepting steam and electric railway properties by a legislative mandate requiring the valuation of existing public utility property and subsequent investments in public utility property according to the following methods of procedure:

"Initial valuations would be made of all properties as of the date of the adoption of the Act.

"These valuations were to take into account every element properly considered under the law of the land, including actual cost, reproduction cost, general expenditures, depreciation, going value, and any other relevant factors, and when once determined would remain unchanged in the future with-

out regard to price fluctuations, cost of construction, or other conditions.

"With respect to the valuation of subsequent investments it was proposed that the amounts of the reasonable and actual cost of the new properties acquired should be entered into the accounts of the companies and added to the initial valuations, determined as described above.

"By this method the Public Service Commission would have always available through accounting control the actual rate base.

"Provision was made for maintenance, depreciation, and [1370] the retirement of any unit of property."

The Chairman: That was his conception of the transition of original cost as a basis of accounting.

Mr. Priest: If some such approach, italicizing Dr. Bonbright's—shall I say?—"gradualness," could be adopted by this Commission, I think that the industry generally would be much better satisfied with it than the approach that it apprehends, perhaps unjustifiably, that the Commission is about to make.

The Chairman: There is an implication in the way in which you present the thing, that the approach which you are suggesting represents a protection for certain values, and that the approach which is implicit in the Commission's original cost proceeding is contrary.

Actually, in the long run, from the long-run standpoint, it is conceivable that the greatest pro-

tection for the properties that you are representing, would be through getting them back as rapidly as possible, under an original cost basis.

Mr. Priest: I don't agree with you, Mr. Chairman. I will attempt to develop that a little further, if I may.

I think that we probably would not be protected, under those circumstances, and I will attempt to go into that in just a moment, if I may.

I think that we probably would not be protected, under those circumstances. [1371]

Now, I am not attempting, by the statements I just have made, in this recent discussion, to indict accounting, as such, and I don't attempt to deny that, when accounting is properly done and when all items of cost are reflected, accounting can throw useful light on value.

But it is one of the basic superiorities of the fair value principle that it recognizes the inability of original cost accounting accurately to reflect value and adopts other criteria on the basis of which an informed judgment may be made.

Now, perhaps I don't need to go into what may happen under conditions of, let us say, runaway inflation, because it certainly is conceivable that, under those conditions, a single hydroelectric generating station might cost as much as the Company's entire plant account, and I would suggest that no practical formula has been developed for computing an increased rate of return to compensate for inflationary conditions which does not, in

effect, require a determination of the present fair value of the property being devoted to the public use.

Commissioner Scott: Aren't you arguing a rate case, Mr. Priest?

Mr. Priest: My argument is——

Commissioner Scott: I am just wondering two things: I am trying to follow you; maybe I don't quite follow you. [1372]

It seems to me that your basic problem, if you have one, is confiscation.

Mr. Priest: That is right.

Commissioner Scott: And there is no taking of your property, is there, by the instant order, which reflects simply an accounting method to be pursued? If confiscation ever takes place, it may possibly arise in some subsequent rate proceeding, where the question of a rate base reproduction cost, the original cost and appropriate indices, and other criteria that you argue for, may be pertinent?

Mr. Priest: I don't agree with you, Mr. Commissioner, for this reason, that, by the order which you entered, the order here under consideration, you have directed the Northwestern Electric Company to refrain from paying any further dividends upon its common stock, until, by debits to surplus, the entire amount of $3,500,000 recorded in Account 107 has been amortized.

Commissioner Scott: And why did we do that?

Mr. Priest: Now, that—well, I don't know what the Commission's reasons are, but let me develop my argument a little further.

Commissioner Scott: You have a pretty good idea why.

Mr. Priest: You asked——

Commissioner Scott: (Interposing) May it not be because there was and is a lack of underlying value? [1373]

Mr. Priest: We assert that there are underlying values here, of course, but you asked how our property was being taken.

Now, as to American Power & Light Company, property is being taken because it is perfectly obvious, as measured by quotations on the New York Stock Exchange, for example, it is perfectly obvious that a common stock which can pay, and is paying, common stock dividends as they accrue to the benefit of that common stock, is of substantially more value——

Commissioner Scott: (Interposing) Then, as to Northwestern——

Mr. Priest: (Interposing and continuing) —— than a common stock which may earn dividends but which may be required to refrain—but on which dividends may not be paid.

Commissioner Scott: Then, as to Northwestern, you argue that there is a taking of property because we have attached a condition which freezes certain accounts until there have been offsetting accumulations, before you can make certain dividends, that that is therefore a taking of your property.

Mr. Priest: I will say, as to Northwestern Electric Company—I have made my statement as to

American Power & Light Company, and I think the taking of property is clear as to American Power & Light Company.

Now, as to Northwestern Electric Company, there is a taking in these two senses: [1374]

First, that by its order the Commission gravely reflects upon the character of the assets recorded in Account 107, and, to that extent, affects adversely the credit of Northwestern Electric Company; and because, if it is proposed that the original cost determination of plant account, which is to be made, pursuant to the Commission's required reclassification, is to be used for rate base purposes.

Commissioner Scott: I know, but you are not in a rate proceeding yet.

Mr. Priest: I know, but I think we are justified in anticipating that as a real possibility.

Commissioner Scott: You have just finished arguing that for rate-making cost is considered as one of the elements. What we are here dealing with is an accounting matter that may affect one of the elements that may be material when you later come to the problem of determining rates.

Mr. Priest: In the case of the brief filed in the Driscoll case, which was signed by general counsel for this Commission, and several other counsel, on the basis of statements contained in your annual reports, and on the basis of statements made by members of the Commission and its staff, I think we are justified in having some trepidation, at least, as to the use to which you intend to put the original cost.

Commissioner Scott: May it not be that you are just scared about the taking of your property? Certainly this is not sufficient in the constitu- [1375] tional sense. Isn't it fear that is involved here rather than the actual taking of property?

Mr. Priest: I am just urging this upon the Commission, Mr. Scott——

Commissioner Scott: (Interposing) I want to get a straight statement from you as to whether you feel there is a taking of property in a constitutional sense, in Northwestern's case because of the limitation placed in the order of the Commission?

Mr. Priest: I have explained why there is a taking in the case of American Power & Light Company.

Commissioner Scott: I am not asking about that; I am talking about the Northwestern.

Mr. Priest: Yes. Now, as to Northwestern, there is a taking, presently, without regard to these fears of ours, as to which I think we have considerable justification:

There is a taking, in that case, because you are reflecting upon the character of that asset, and therefore are reflecting upon the credit of the Northwestern Company adversely.

Commissioner Scott: And that rather than the condition we attached to our order results in confiscation?

Mr. Priest: As to that particular aspect of the case, yes, but I urge again that we are justified in the fears [1376] that we have expressed with re-

spect to the use to which this Commission intends to put this original cost determination.

Commissioner Scott: But that is fear, rather than the taking of property in the constitutional sense, isn't it?

Mr. Priest: Yes.

The Chairman: In your statement that you have justifiable fear as to the use to which this might be put——

Mr. Priest: (Interposing) Yes.

The Chairman: (Continuing) ——this doesn't, in any way, as I see it, preclude the fact of having your books ultimately set up on an original cost basis—doesn't in any way preclude your seeking to establish any value which may be considered necessary for the purpose of sustaining whatever rate you feel justified in charging, when you go before the regulatory bodies——

Mr. Priest: (Interposing) Including this body—including this body.

The Chairman: No, I don't mean this body particularly. I am speaking of regulatory bodies in general.

Mr. Priest: I am speaking of this body; I am thinking of this body.

The Chairman: If the courts will sustain you in your claims of reproduction cost value, you have no limitation on the thing. [1377]

Mr. Priest: We are not grounding our case solely on reproduction cost value. We are relying on all the criteria of value in the case of Smyth against Ames.

Commissioner Scott: But you admit that you have a fear because someone has filed a brief in the Driscoll case or someone made an argument or a speech.

Now, you know that is not a sound legal argument, Mr. Priest, in the sense that you are attempting to claim an actual taking of that property on that basis.

Mr. Priest: No it isn't, but it is an argument appropriately addressed to this Commission and the discretion of this Commission.

Commissioner Scott: Is it a lecture, yes?

Mr. Priest: No.

Commissioner Scott: I will accept it that way.

Mr. Priest: I am not trying to deliver a dissertation on economics, and in view of that suggestion I shall eliminate further argument along that line, except to say this: I want to quote just from two authorities.

Quoting now from Professor W. D. Paton of the University of Michigan, speaking as the Dickinson Lecturer at Harvard University in 1940 on the subject "Recent and Prospective Developments in Accounting Theory," Professor Paton said:

"As suggested earlier, recorded costs may be generally assumed to indicate true economic significance, actual value [1378] at the moment of incurring.

"With the passing of time, however, the book figures became less dependable measures of effective current costs and in periods of sharp and prolonged price movements the shortcomings of the data shown by the accounts may be serious."

And again, just one paragraph from Dr. H. W. Sweeney, in the preface of his "Stabilized Accounting":

"The success of the whole system of business depends upon the truthfulness of reports. The truthfulness of reports depends mainly upon the truthfulness of accounting. The truthfulness of accounting depends largely upon the truthfulness of the dollar—and the dollar is a liar! For it says one thing and means another."

Now be it understood that I am not talking about Roosevelt dollars as distinguished from Coolidge dollars. I think they are both liars.

Commissioner Draper: You mean both dollars are liars?

Mr. Priest: Yes, sir. I gladly accept that correction, Mr. Draper. I hope the record so shows, Mr. Reporter.

Mr. Smith in his paper—and I wish Mr. Smith would listen to this quotation, because, again, I don't want to misquote him—Mr. Charles W. Smith, in his paper "Original Cost—The Regulatory Viewpoint": read before the 1940 Convention of the American Gas Association, said:

"In the absence of cataclysmic price upheavals, the [1379] original cost principle, in my opinion, will lead to more informative financial and operating statements."

I will be through with this line of argument in just a moment, Mr. Scott. I would be glad to agree with that statement of Mr. Smith's—and I think

it is accurate, Mr. Smith—If he would define what he means by "cataclysmic." A change of price levels of as much as ten percent that might produce bankruptcies, certainly would seem cataclysmic to the bankrupt.

I am sure I need not labor my point. This chart shows, using what I believe are generally accepted price indices, first the Engineering News-Record of general construction costs, next the Handy and Ritchie index of Electric Light & Power construction costs, you will note that in the case of general construction costs, there is, just since the year 1914, a change from an index figure of approximately 89 in 1914 to 250 in 1920, and presently to approximately 257, with the index steadily ascending.

The same remark—the same observation may be addressed to the data shown by the Handy and Ritchie indices. In order not to impose further upon the Commission's time—I am grateful for the time you have hitherto allowed me.

I would like ten minutes additional to reply to Mr. Slaff. There have been a good many interruptions.

Commissioner Scott: I would like to ask you one question. [1380]

Mr. Priest: I want to make one final observation and I am through.

Just the other day my attention was directed to a quatrain from the pen of John Greenleaf Whittier, and it seemed to me pointedly to express the

feelings of some of us who are concerned about the rigorous application to the electric utility industry of the original cost concept.

Mr. Whittier said, "The toad 'neath the harrow knows just where each tooth point goes, while the butterfly upon the rose preaches contentment to the toad."

Commissioner Scott: Whittier wasn't deciding any utility case, was he?

Mr. Priest: I think Whittier anticipated our feelings, Mr. Scott.

Commissioner Scott: Earlier, when you were talking about Benson vs. Crowell—when you were talking about the application of Crowell vs. Benson in making your constitutional argument as to whether or not you were entitled to a determination of the facts here involved before a judicial tribunal in an independent hearing or proceeding, and I think I asked you if the Court in Crowell vs. Benson wasn't talking of litigation involving private rights as distinguished from a decision of public rights. I don't recall what your answer was.

Mr. Priest: My answer was, if I may repeat it, that it is applicable to a confiscation situation.

[1381]

Commissioner Scott: In direct answer to my question, I would like to refer to Crowell vs. Benson, in which Mr. Justice Hughes said that, "As to determinations of fact, the distinction is at once apparent between cases of private right and those which arise between the government and persons

subject to its authority in connection with the performance of the constitutional functions of the Executive or Legislative Departments.

"The court referred to this distinction in Murrays Lessee vs. Hoboken Land and Improvement Company, supra, pointing out that "there are matters involving public rights—" " and I take it the regulation of public utilities would be so classed.

Mr. Priest: It involves both public and private rights.

Commissioner Scott: "'Which may be presented in such form that the judicial power is capable of acting on them and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States as it may deem proper.'

"Thus the Congress in exercising the powers confided to it may establish 'Legislative Courts'—as distinguished from 'Constitutional courts in which the judicial power conferred by the Constitution can be deposited'—which are to form part of the government of territories or of the District of Columbia, or to serve as special tribunals, 'to examine and determine various [1382] matters arising between the government and others, which from their nature do not require judicial determination and yet are susceptible to it.' But the mode of determining matters of this class is completely within Congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals."

I just want that in the record in connection with your argument on the question of whether or not this commission is the character of tribunal to which Congress might delegate the power of finding the facts in the instant proceeding.

Mr. Priest: I think, Mr. Scott, that that question is answered by the court's reference to the Ben Avon Borough case in which exactly the same issue of confiscation that we are urging here is raised.

Commissioner Scott: But it appears quite appropriate to point out that Mr. Justice Hughes used the language I just read in the Crowell vs. Benson case; it seems to qualify that decision.

Mr. Priest: He also cites and relies upon the Ben Avon Borough case, which as I say involves precisely the question raised here.

The Chairman: I would like to ask one question, which is precisely the question I asked in different form.

The real problem involved, concerned with the question, [1383] as I understood your statements, I think, was whether there are values on the asset side as found in terms of the standard criteria.

Mr. Priest: That is one of the basic questions, Mr. Chairman.

The Chairman: If there is not value there represented by this matter of $3,500,000, then your point of view would be that someone has authority to see that that doesn't appear on the books as representing value.

Mr. Priest: I would think so, Mr. Chairman, yes, sir.

The Chairman: These standard criteria that you are speaking of, are changing criteria, aren't they? They have been, over a long period of years. They have depended a great deal on court interpretation. That is, the whole concept of fair value doesn't change, it seems to me. I wanted to get your view on it.

Mr. Priest: Just let me make one observation in that connection. I think it is perfectly obvious that original cost isn't the sole criterion and I think that has been illustrated strikingly, very recently, by the decision of this Commission approving the sale of the Nebraska properties of the Iowa-Nebraska Light & Power Company, for the figure of some $19,500,000 as I recall it, and I am quoting just the approxi- [1384] mate figures, when the original cost of those properties was only some $16,000,000 plus and the reproduction cost new, as determined by appraisers was around $20,000,000.

In other words, those properties were sold at arms-length in what was essentially an open market transaction, on the basis of their fair value, and one of the determining criteria was reproduction cost new.

The Chairman: In the first place, the Commission wasn't passing on the question of whether or not the price paid was a fair price or not in that case.

Mr. Priest: But it does illustrate the present use of the fair value concept. Now, those properties passed from a willing but not compelled seller to a willing buyer on a basis which gave full consideration to the fair value concept, that is all I am saying, Mr. Chairman.

The Chairman: What I want to simply raise as a question is whether your conception of fair value, which admittedly is related to the earning capacity of the property, will necessarily be permanently the concept of fair value in an industry where the question of earnings is, in turn, related, through rates, to the concept of the value of the property.

You mean you get into a vicious circle?

Mr. Priest: Of course you do.

The Chairman: If you try to apply the same concept of [1385] fair value in a regulated utility field, that you apply in business in general.

Mr. Priest: That is illustrated by the situation in the Street Railway Company, as to which I think Mr. Smith said at one time—I am quoting you off-hand now, Mr. Smith; correct me again if I am wrong.

Mr. Smith said, "That to apply the fair value concept to Street Railways, would produce asinine results."

Mr. Smith: That is correct.

Mr. Priest: "Because it would show reproduction cost, new figures, for example, that had no significance whatever." I accept that statement

as perfectly true, but the application to Street Railway properties of original cost as measuring value, would produce equally asinine results, that is all I am saying.

The Chairman: I rather wonder whether not only the street railways but the railroads themselves haven't suffered as a result of insistence on this thing that you call value to the point where ultimately competition overtook them?

Mr. Priest: Perhaps so. It certainly is true, Mr. Chairman, that if we got into a descending price spiral, if we got down to prices such as those that prevailed in 1932 or 1933, or if prices go lower, I would suggest to you that the original cost concept can't protect security holders under those circumstances, because again the fair value concept will [1386] rule.

A very large part of all the business of an electric utility is competitive in character. All of our industrial business is competitive, for example.

When we attempt to persuade a large industrial consumer to enter into a contract with us, he considers all the circumstances of the case, we quote him a price and he determines whether or not he can better that price by installing his own equipment, by putting in diesels or something else.

Certainly, if the price levels have fallen substantially and we have got original cost, for example, at an index figure of 200 and he can install his diesel unit at an index figure of 100, he is going to go to the diesel unit or we will have to lower

our rates, so that they will cease to be compensatory.

The Chairman: As a matter of fact, quite aside from the differences in price level, you would have to charge him at some other rate if there were no competitive force acting?

Mr. Priest: That is true of other aspects of the electric business that are competitive. For instance, in the residence field, when we sell electricity for cooking and heating, we are competing with gas, oil and other types of fuel and so on. In the case of electric refrigeration, we are competing not only with the ice man, but we are competing with gas refrigeration. The competitive character of the service rendered by electric utilities—this is by way of an aside— [1387] is such that the original cost concept won't protect our security holders in a period of sharply declining price levels.

Mr. Slaff: Your Honor, are we going to proceed now? It is now 12:30. What is your pleasure?

The Chairman: We will go ahead.

Mr. Slaff: Very well. [1388]

ARGUMENT OF GEORGE SLAFF

Mr. Slaff: If it please the Commission: Adaptability or would-be adaptability of values to a fluctuating price index is matched, it seems to me, quite well by the adaptability of the respondent and the intervenor here to make an argument meet a specific situation. I want to refer first to the discus-

sion between Commissioner Scott and Mr. Laing, with respect to what the $3,500,000 which we are here discussing represents.

As I understood Mr. Laing's answers to Commissioner Scott, the $3,500,000 represents not cost, nothing that has been paid for property, but value. But let me point out to you that this $3,500,000 has been included by the respondent as part of the original cost of its property.

The $3,500,000 was originally placed—and as far as the company is concerned still belongs in account 301 as the original cost of organization of the company. It was suggested at the hearing originally held in last summer, by one of the expert witnesses for the company, that perhaps it should be in account 303 as representing cost of miscellaneous intangible plant, but in any event, this was still cost, and it was represented to you in the briefs filed by the company, the original brief, as well as the reply brief, that this was cost.

I quote now from the original brief filed by the company, [1389] page 50: "Perhaps it is conceivable that the investment made by Northwestern Electric Company in the essential promotional services of the Fleishhackers could have been assigned to Account 303, instead of Account 301, but, in any event, such an investment was made, made in a substantial amount, and clearly is entitled to be retained on the asset side of the Company's balance sheet."

And then, in the reply brief, in discussing this same item of $3,500,000, at page 32 of that brief, we are met with the statement that: "At least for the purposes of the System of Accounts, the Company should be permitted to record its assets at cost, i.e., the cash value of the consideration paid."

So what we have had up until this very moment is an attempted representation by the company that this $3,500,000 represents original cost of property acquired by the company, and we had long testimony in the original hearing, if it can be called testimony—at least it was a witness testifying to that effect—that this $3,500,000 actually represented what it purported to represent, and should properly be included as part of the cost of the company's property.

Now, furthermore, as the second instance of this extreme and ready and capable adaptability, I point out that Mr. Priest very frankly pointed out to the Chairman ultimately that capitalization of earnings was not permissible in the valuation of utility properties, and yet the company [1390] offered on the rehearing two exhibits designed to show—and I quote from the statement by counsel as to the purpose of the offer when I objected to that—designed to show "the values from the standpoint of the company's earnings that were accruing to the common stock during the period from 1921 to 1940, both inclusive, and I think perhaps now we can ultimately all of us agree that these exhibits, at

least, which purported to show values on that basis, were properly rejected by the Examiner. So we seem to have a sort of "now you see it; now you don't" situation confronting us: what suits the purposes of the moment seems to be urged.

Now, I am quite interested in this last exhibit offered for your Honors by Mr. Priest in the course of his argument, because I think it illustrates perfectly the point I hope to make subsequently. I call attention to it now, that what the respondent and the intervenor seek to substitute for accounting is a sort of oscillating instrument that will cause changes in the balance sheet to be reflected from year to year, or, forsooth, in shorter periods.

Perhaps the indices are to be followed from month to month, and we have a corps of specially designated bookkeepers in the auditing department of a utility company charged with the responsibility of adjusting the balance sheet to the fluctuation in price levels. As I shall point out subsequently, that is all that is being urged upon you here, and that is all [1391] that the precise issue, which is involved here, boils down to.

Now just precisely what is that issue? This Commission, in its original opinion, decided that the issue of the common stock was a disguised gift by the promoters to themselves. The only thing I take exception to there is the word "disguised," because the very first time that was critically examined by anyone, it was perfectly apparent that there hadn't even been any decent disguise about it.

The Oregon Commissioner, when he first examined that transaction critically, came to the conclusion, which you pointed out at page 22 of Opinion No. 56, that the claimed amount: "The testimony in support of this item is obviously too speculative and conjectural to justify its inclusion in operating fixed capital, and it is therefore eliminated therefrom and should be expunged from the books."

So, too, the Washington Commission, in connection with the approval of the write-down of the common stock from a hundred to thirty-five dollars, which Commissioner Scott inquired about, and as to which Mr. Laing said a reservation had been made by the Commission—by both Commissions—so, too, the Washington Commission, in addition to the reservation that it made in that order discussed by Mr. Laing, had the following to say:

"In an application before the District Court of the United [1392] States for the District of Oregon, No. 20143B, the debtor applicant here sought relief under the provisions of Section 77B of the Bankruptcy Act. In 1935 the Public Utility Commissioner of Oregon, and the Department of Public Service, of Washington, jointly appeared therein, as provided in that statute, and represented to the Federal courts at that time that the book value assigned to this common stock was excessively overstated, and that the presence of such excessive figures of value had been and continue to be a serious detriment to the debtor, and created a situation adverse to the public interest."

And what the respondent and the intervenor now ask you is that you permit in somewhat modified form this serious detriment to the respondent, and this situation adverse to the public interest to continue, because they insist that there be continued upon their books of account an alleged asset based upon alleged values, and those values are based only, despite Mr. Priest's glib talk about the usual standards and the normal standard and criteria of value, when you boil them down and eliminate the capitalization of earning power, based solely upon the reproduction cost of the property.

Now, of course, the issue in this proceeding and in this reargument, rather, ought to be what disposition shall be made of this $3,500,000 which your Honors have found to be a write-up. [1393]

Starting back in May 1, 1940, when the original report of the staff, of the division of original cost was transmitted to this company, a request was specifically made that the company submit a plan for disposing of the amount of $3,500,000 set forth on page 29 of the report and described as the par value of 100,000 shares of the common capital stock of Northwestern Electric Company, and starting there with May 1, 1940, the staff and this Commission has vainly sought to secure from this company any plan of disposition of this amount.

In your order you provided for a disposition, and upon application for rehearing you granted that for the purpose only of permitting the submission of a plan of disposition by the company.

You permitted, as I recollect, a continuance. The company asked for it and got it. They asked for rehearing and got it. They asked for a change of place of the hearing from Portland to Oregon, and they got it. And American Power and Light asked for permission to intervene, and they got it, but did the Commission get any plan of disposition? Definitely not. And the Commission still hasn't received even the slightest whisper of a plan of disposition.

I think that arises somehow from what, in my judgment, is the rather curious interpretations that are placed on plain words in the English language, by this company and by this system of which this company is a part, and I mention in passing, as illustrative of what I mean, the fact that this company [1394] consistently, and this system consistently, have interpreted that plain language of your electric account instruction 23, which says, "it is likewise not intended," that charges previously be made to operating expenses shall be capitalized. They have interpreted "it is likewise not intended" to mean "it is permitted that," so it comes with no great shock, at least, to find that there is the word "disposition" interpreted as being synonymous with "retention," rather than, as I had always conceived it, an antonym of retention, but nevertheless, what you have received is a plan for disposition which, as Mr. Laing indicates, is a complete indisposition to dispose.

Now you have decided that that $3,500,000, al-

legally original cost of plant, which the company says makes no difference, can be in Account 301, or Account 303, but just so long as it is original cost of electric plant, you have decided that that is inflation, that that is pure water, if one should use the term "pure" in any connection in respect to that $3,500,000, and the single issue that should be presented here is whether there is a better plan of disposition of that $3,500,000 write-up than that which was ordered by the Commission in its opinion 56, and the accompanying order, namely; that the earnings applicable to that common stock be retained in the company until the full $3,500,000 had been disposed of and had been built up.

However, since the company presented no evidence with [1395] respect to a plan of disposition at the rehearing which you granted only for the purpose of permitting them to present such a plan, have insisted that the write-up remain in the plant account, and since we have heard no plan presented here, the issue can properly be discussed here, can properly be characterized somewhat as follows: May the doctrine of Smyth against Ames be used to soak up what is admittedly, for purposes of this discussion, and this rehearing, what is admittedly the water in this company's plant account and capital structure?

I suppose it is inappropriate to state here in whose eye that water might be squirted after the sponge soaked it up, but, nevertheless, that is the problem that has been posed by the company and

it might be well to look briefly at the evidence which the company offered in support of its position, that so long as there was some possible claim of value, that could be made, inflationary items must be retained to stand as part of cost of plant, when they are admittedly, admittedly and concededly, not part of cost.

They offered first evidence of reproduction cost of the properties, as has been pointed out, at four dates: December 31, 1924, December 31, 1932, '35, and June 30, 1940.

The alleged valuation at the end of 1924 was supposed to represent the value at or about the time that American Power and Light Company acquired its interest in the Northwestern Electric Company. [1396]

The valuation at the end of 1935 was supposed to allege the value of the property approximately at the time of the write-down of the common stock from a hundred par value to $35 par value. The valuation at June 30, 1940, was supposed to represent the value at the time of hearing—approximately at the time of hearing last summer.

The valuation as of December 31, 1932, I don't know quite for what purpose it was offered. They happened to have it around and they said it might just as well go in, as I understand the statement in the record. That evidence was objected to by counsel for the Commission and excluded by the Examiner, and, as I have pointed out similarly, there was excluded from the testimony exhibits

which purported to show net income available for the common, offered for the purpose of showing the values of the common stock based upon the earnings, in order to support the retention of those alleged values as part of cost of plant.

The theory back of this, as I think is quite clear, was, at least—because apparently, although one never can tell, apparently that has now been abandoned, or at least abandoned for the time being, for the purposes of this particular discussion—but apparently the theory back of that is that if you could exploit the public sufficiently so that you could force the public to make earnings on admitted inflation, you may then capitalize those earnings and the process of capitalizing [1397] those earnings on admitted inflation transmutes the inflation into something which has the benediction of everyone concerned.

Well, obviously, as has been brought out, that just cannot possibly enter into any discussion of this sort.

Now, then, we can assume for purposes of this argument that fair value and that reproduction cost and that the doctrine of Smyth against Ames have a proper place in the determination of rate base. That can be accepted as a summation on this argument, and lends no validity whatever, however, to the attempt to inject the Smyth against Ames concept into accounting for fixed assets.

Before going to that, and in connection with that, let me point out that, as the questioning has indicated, and as I think Mr. Priest finally concluded,

with respect to Northwestern Electric Company, there is not and cannot be any confiscation of any sort in any legal or economic or any other sense by the action which the Commission has here taken.

All I could determine that Mr. Priest was worried about, was the grave reflection on the character of the asset made by the Commission, but let me say that your Honors gravely reflected upon the character of that asset, and properly so, before you ordered the disposition, when you came to the conclusion that that was inflation and nothing but inflation, and that no property had been received for it, that it represented financial manipulations and nothing more, you did all the [1398] reflection necessary on the character of that asset.

Your action in ordering a disposition of that amount, as you did, in no wise, other than that, proceeded to point any greater finger of scorn at that asset than you had already done.

Consequently, in that respect certainly, there has been no confiscation of the property of Northwestern Electric Company.

I don't think I need discuss the other aspect of the alleged confiscation mentioned by Mr. Priest, his fear that sometime in the future the action of the Commission might be reflected in attempts to adopt an original cost rate base, rather than a so-called fair value rate base. Obviously, that isn't confiscation.

With respect to American Power and Light Company, what you have done is not to take any property from them; but certainly to require that before they may secure dividends on common stock for which neither they nor their predecessor owners conveyed any property to the Northwestern Electric Company, before they may receive dividends on that common stock on the alleged capital of the company, there must be some capital of the company. You have required them certainly to reinvest any earnings on that common stock in the business until there is a paid up capital, and when there is a paid up capital you have said [1399] then and only then, may dividends be paid on capital.

You have said that dividends may be paid on capital instead of out of capital, and if that is confiscation, even as to American Power and Light Company, then we have an entirely new conception of confiscation.

And let me, in that connection, before proceeding to the other problem, deal with another matter raised by Mr. Priest, namely, that it was not the purpose of the Congress to permit the Federal Power Commission to make fundamental findings of fact that affect vested interests, without independent judicial review, that since the Commission's findings of fact are binding upon the courts if supported by substantial evidence, there is no independent judicial review.

Hence the conclusion is drawn that the Commission cannot make, may not make, any fundamental findings of fact.

However, I presume that you may make subsidiary or trivial, or unimportant, or unnecessary findings of fact, but you dare not make any fundamental findings of fact.

I suggest that if there were the slightest bit of validity in that argument, that it would be time for this Commission properly to shut up shop and for all of us to go about gainful occupation, but our occupation here, as set down by Congress, is for the staff to present information upon which the Commission can make and should make fundamental and far-reaching findings of fact when and if necessary. [1400]

Of course, those findings of fact will affect vested interests and interests which attempt to be vested and to remain vested, and I cannot, with all the best deference to Mr. Priest—in fact, in view of the deference which I hold for his legal ability and acumen—believe that that can be seriously urged upon the Commission that you may not make any substantial findings of fact.

Now you made a substantial finding. You made a substantial finding that this $3,500,000 was not a part of cost.

Mr. Laing, in his opening, in which he sketched out the history of the original transaction, and how this common stock came into being, and how it was done more or less with mirrors, illustrated, I think, completely, the validity of your finding that there simply was nothing in back of the original issue of the $3,500,000.

There is some talk about services of promoters and so on, but in the record you will find the testimony, and you did find the testimony, which supported completely the finding that there was nothing to support the stock.

I quote briefly from the record in which the witness who testified as to these alleged services, the treasurer of the company, testifies as follows:

"Question: When were the books of account of the Northwestern Electric Company opened?

"Answer: I don't know. I assume shortly after incorpora- [1401] tion.

"Question: Do you know how much time the Fleshhackers spent in connection with this enterprise in Portland?

"Answer: I do not.

"Question: Do you know how much time they spent in connection with this enterprise in San Francisco?

"Answer: I do not.

"Question: Do you know how much they spent in connection with this enterprise any place else?

"Answer: I do not."

And so the litany of "I do not" went on and on through the record, and as I have said, you came to the conclusion—and that is determinative in this reargument: we can't go back of that in this reargument—that this $3,500,000 did not represent cost, it represented inflation, and now the company poses the argument that since, in its view at least, price indices and price costs, construc-

tion costs, have caught up with this original inflation, the original sin is to be forgotten and is to be completely overlooked, and what is more, is to be allowed to remain in the balance sheets.

To introduce the concept of fair value of reproduction cost into fixed asset accounting will be to bring nothing but chaos and confusion into what should be a reasonably orderly process, as Judge Healy, to whom I shall refer subsequently, and whom I shall quote subsequently, has said in one of his [1402] papers that "is as specious as Smyth with a 'y' ".

That is perfectly illustrated, as I pointed out earlier, by this lovely exhibit which Mr. Priest presented to you.

In 1920, we have one figure on the books of the company, the balance sheet, the fixed capital assets, as representing cost of property installed that year.

Comes along 1921, the first of the year, our corps of bookkeepers get very busy and they write that down.

Comes 1922, they write it down again.

Cheers in 1923: they start writing it up all over again, and so you get a process of perpetual writing down and writing up of fixed assets.

Now the fundamental basis of accounting for fixed assets is to record costs, not to record in the balance sheet of the fixed asset accounts the ups and downs of fluctuating price levels.

The Chairman: Mr. Slaff, just as a matter of

information, I assume you made some study of their books—did their books reflect that drop that is shown between 1930 and '35 in prices?

Mr. Slaff: Oh, no, sir; the books of the company, except insofar as they represent any inflation, but construction cost of the company, and as to properties actually constructed, are recorded at cost on the books of the company, and have always been so recorded.

In other words, property which this company constructed [1403] let us say, in 1915, which was approximately one hundred on the index here, is still recorded on the books of that company at the cost of construction. It is not today recorded on the books of the company at a price approximately two and a half times or two times.

The Chairman: That is, the books don't follow the procedure that is urged by Mr. Priest?

Mr. Slaff: Very definitely not. They follow it only when it becomes necessary to follow it, when an inflationary item is discovered and there must be some rationalization of such item, but definitely not.

The books record the actual costs of constructed property. Of course I might say by way of aside that the company also in this very proceeding, as your Honors will recollect, sought to reaccount for administrative and general expense despite the provision of the system that says it is likewise not intended that such reaccounting may be performed, and very seriously urged upon us at the hearing

and urged upon your Honors in the brief, that this reaccounting should be permitted, and any refusal to permit it was a violation of fundamental constitutional rights, interfered with their vested interests to reaccount, and so on, and so on, and so on, and yet the company does not appeal from that point of the Commission's decision in which you have refused to allow them this opportunity, which they sought, of a reaccounting. [1404]

Consequently, it is perhaps not surprising that from time to time we look not with complete approbation nor with complete credulity upon the urgings that we hear of interference with vested rights.

We look upon them not completely as urged, and so, too, here, the urging that is made that the books of account in this respect, in this one respect, should follow the fluctuations of price level, is something which we can look upon with a certain amount of skepticism.

I should like to point out, in this connection, a statement made by Colonel Carter, who is senior partner of the firm of Haskins and Sells, at the National Association of Cost Accountants annual meeting, as contained in the year book of the National Association for 1933.

I point out Colonel Carter's statement simply because Haskins and Sells are reasonably well known to counsel, being, as I understand it, auditors for the Bond and Share system, and practically all of the companies in the Bond and Share system;

and what is more, in this very case, at the original hearing, one of the partners of the Bond and Share—one of the partners of Haskins and Sells, Mr. William Bell, testified on behalf of the company. That was at the original hearing last year.

I might mention in that connection, that this company at the rehearing which your Honors granted, produced no testimony, [1405] no accounting testimony, no economic testimony, no testimony of any sort, to the effect that the procedure which they propose, to change the balance sheet into an oscillating sort of thing depending on fluctuating price levels, was proper.

No such testimony was produced at this hearing, and my guess—and I think it is a reasonably well grounded guess—as to why it was not produced, was because you just couldn't get anybody to come down and testify to that effect.

Well, you couldn't get anybody, who had any standing any longer, in either of those professions to come down and testify to that effect; but to revert, Colonel Carter says that from an accounting viewpoint it is certainly consistent—and from a practical viewpoint logical at least—to deal with fixed assets on the basis of their historical cost rather than on a basis of reproduction cost determined from year to year, or at various intervals when fluctuations occur, and when the economic situation forces radical changes in the price level.

And as was pointed out just as late as January, 1941, by the Committee of the Accounting Pro-

cedure of the American Institute of Accounting, reporting on the statement of accounting principles which had been gotten out by Sanders, Hatfield, and Moore, it should be stated that cost is the basis of all accepted accounting.

I call your Honors' attention to a statement by Stempf of Touche-Niven, contained in the Accounting Review for March, [1406] 1938. It seems to me that a statement of principle relative to accounting for fixed assets requires first and foremost a reavowal of the desirability of stating the amount of fixed assets on a basis of cost less accrued depreciation, depletion, and amortization.

And in this same connection I call your attention to an article which I mentioned, or a paper which I mentioned, by Judge Healy, in the Accounting Review for March, 1938, called "The Next Step in Accounting," in which he says—and the judge, I think may well be considered to be an authority on utility accounting and the evils of improper utility accounting: "I think the purpose of accounting is to account, not to present opinions of value."

Parenthetically, I may say that may seem ingenuous, but I agree with it that the purpose of accounting is, or at least ought to be, to account.

The judge goes on to say: "not to present opinions of value. The value of a corporation's property may be much, or little, or uncertain. Its cost is usually certain.

"The capital entrusted to the management can

usually be ascertained. What has been done with that capital can be ascertained through accounting.

"The steward must account for the talents entrusted to him. Accounting to me is the making of a historical record of financial events. Valuation is an entirely different matter." [1407]

However, what is proposed by the respondent and the intervenor is that their accounts keep abreast day by day of history and record, not the changes which history has made on their investment on their property, but which history may some day in the dim speculative future, may some day bring about.

"Valuation," says Judge Healy, "is a very different matter from making a historical record of financial events. I don't mean that there are no circumstances under which unrealized losses or gains should be recognized on books of account.

"I do believe," he contends, "that unrealized gains should not be entered upon accounts until the probability or certainty of the permanence of the gain can be well established. I believe that good accounting should observe this principle."

And yet, precisely what is proposed to be done here is that there be entered upon the books of account as a fixed asset and as representing cost, original cost of a fixed asset, an alleged gain that is conceededly unrealized, and certainly this chart and events, facts as we know them today, certainly preclude even counsel from urging that the proba-

bility or certainty of the permanence of the gain can be well established.

This attempt to enter such unrealized gains on the books of the company in the fixed capital account, to support an admittedly inflationary attempt, refuses to admit that the days of the Insulls and the Hopsons—and, one might observe [1408] in this case, of the Fleishhackers in utility financing has passed.

That is, gone. I had assumed by now that that was reasonably well understood that that was gone. But apparently I at least had been in error in that respect.

I had assumed that financial statements were supposed to reflect fact and not fancy, that they were supposed to reflect realities and not something brought about by mystical legerdemain, but I find here that we have an attempt to deny not only the laws of the land as I understand them to be, and the laws of economics and accounting, but also the laws of gravity, because it was apparently the company's thesis that whatever goes up stays up.

Now I want to call your attention further to the vast body of authority which can be found in accounting literature to the effect that this procedure proposed by the company is thoroughly improper.

I had intended originally to quote to your Honors considerably more than I have so far done, but I propose now to pass that part, and to conclude simply by saying this—although I must confess that there are so many—there is; before concluding, let

me make one observation: With respect to the N. T. and T. case, and the Edison against Malthie case, upon which counsel placed such reliance. I might point out that—if I find the New York case—the N. T. and T. case,—that not only does counsel have a ready adaptability to circum- [1409] stances, but counsel, like a good counsel, like a good advocate, has the excellent ability on behalf of his client, to stop at the right place when he is reading from a court decision, because when Mr. Priest read, he read to you as follows, from page 240:

"The Commission is not under a duty to write off the whole or any part of the balance in 100.4 if the difference between original and present cost is a true incremental value," and right there is where Mr. Priest stopped.

What the court goes on to say is: "on the contrary, only such amounts will be written off as appears upon an application for appropriate directions to be a fictitious or paper increment."

Your Honors found this to be a fictitious paper increment and nothing else, and upon application for appropriate directions made pursuant to the system of accounts, you ordered it written off, and upon rehearing no plan was presented for any disposition, and you should continue in your original order. The New York system of accounts made no provision for flexibility, made no provision for the right of the Commission to order written off or retained in the accounts amounts which were properly included in that account, and you must

remember that the New York account which caused the system to be thrown out, for the time being, anyway, in New York, vs. Edison, made no distinction, as your system of accounts does, [1410] between account one hundred point five and account 107. Everything was there, lumped into one account, and as provided by the system—or as the court interpreted the system, everything, inflexibly had to be written out, but that obviously has no applicability here, and the A. T. and T. case strengthens, thoroughly strengthens every bit of the action which your Honors have taken.

I had intended—I am reminded to quote also at some length from the books on Principles of Public Utilities, by Jones and Bigham. The reason I had intended to do that was because I know that counsel, particularly Mr. Priest, recognize Elliott Jones as an eminent and capable and leading authority in the field of public utility regulation.

Mr. Priest: Don't put words in my mouth.

Mr. Slaff: But time precludes me from going into that. However, I do want to reiterate that you have made a determination that this $3,500,000 is inflation and nothing else. You have ordered it disposed of by a plan which is sound, logically, economically, in every respect, not a single vestige of an argument or testimony has been presented to you with respect to any other plan of disposition, and I very seriously urge that you adhere to your original decision. [1411]

REBUTTAL OF MR. A. J. G. PRIEST

Mr. Priest: May I have ten minutes, Mr. Chairman?

The Chairman: Yes, sir.

Mr. Priest: It is always a pleasure to appear against Mr. Slaff. He is thoroughly competent and even at his most specious is always interesting and forceful, but he has put some words in my mouth that I did not utter.

He suggested frequently that I recommended that our accounts be adjusted from time to time to reflect these, shall we say, cataclysmic——

Mr. Smyth: (Interposing) No, not cataclysmic.

Mr. Priest: (Continuing) ——changes in price levels that I showed on the chart that I submitted to your Honors. That chart was submitted, of course, only for the purpose of demonstrating to this Commission that original cost, that original cost is not a proper sole criterion of value, and was submitted for no other purpose, and our contention is—I had hoped to make it clear—our contention is not that our books are required to be rewritten to reflect these changes in price levels, but merely that where our books reflect a constitutional right that had been vested prior to the effective date of the Act under which this Commission is operating, that in those circumstances, you may not require substantial values measured by all the normal criteria of value to be written off without confiscating our property, without taking our prop-

erty [1412] without due process or without taking our property for public use without compensation.

The Chairman: Isn't it a basic question whether accounts are supposed to reflect costs or whether accounts are supposed to represent fluctuating value?

Mr. Priest: No, sir.

The Chairman: Isn't that the basic issue you raise?

Mr. Priest: No, sir; it is not.

The Chairman: This item you are talking about, apparently you are justifying on the basis of value?

Mr. Priest: I am justifying it on the basis of value. On the basis of the contention that that particular right had vested before this Act took effect. I justify it, if your Honor please, among other things, by directing your attention to the case, among others, of Landell vs. Bailey, the so-called Bush Terminal case, 23 New York, Supplement (2d), December 23, decided on October, 24, 1940.

[1413]

The same thing is true of this corporation which was organized under the laws of the State of Washington.

Under the laws of the State of Washington, a capital stock dividend may be declared, in the case of Washington Gas & Electric Company out of unrealized depreciation of assets.

Mr. Slaff suggested that I stated that earnings should not be taken into consideration in arriving at the fair value of a public utility property. If I said that and I don't question the statement that

I did, if I said that I did not mean to say it. What I was attempting to say and what I say now is that earnings should not be and cannot be the sole criterion of value in determining the value of public utility property, but earnings are one of the criteria of value, which are provided for in the case of Smyth against Ames and I quote now from the Smyth against Ames decision.

"And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute."

Those were among the criteria of value. [1414]

Commissioner Scoft: Was the order for the purpose of determining the valuation of your property?

Mr. Priest: No, sir.

Commissioner Scott: That is what I wondered, if it was. I thought the order as defined in the problem before us was the current determination of cost.

Mr. Priest: No, sir. The issue in this proceeding, as I understand it, is whether or not this amount of $3,500,000 which we assert is supported by subtsantial values upon the left hand side, the asset side, of this company's balance sheet shall be written off. I understand that to be the issue before this Commission in this proceeding, on the question of whether or not the property of Northwest-

ern Electric Company is being taken by the order that you propose to make.

Commissioner Scott: By the making of the order?

Mr. Priest: By the making of the order. I suggested that the company's credit would be affected, and obviously would be affected, because, for example, a bondholder, or rather a prospective purchaser of bonds, is going to be far less willing to purchase bonds from a company that has a value of, let's say, $13,500,000 than he would be to purchase bonds from a company that has a value of $3,500,000 less, or only $10,000,000, and the same thing is true upon the sale of preferred stock. [1415]

The Chairman: I asked whether a prospective purchaser of bonds would not have greater confidence in purchasing those bonds at the end of a period in which a value had been placed behind a claimed equity which rests today on fictitious value.

Mr. Priest: I think he would be interested in having reflected upon the books of the company an item representing rights that we claim vested prior to the effective date of the jurisdiction of this Commission under parts two and three of the Federal Power Act, and where that value is so reflected, that in his eyes or in the eyes of other investors, that value should not be required to be written off.

The Chairman: That isn't the point I was raising. I was raising the point of view of the prospective bondholder who sees a company in which $3,500,000 of stock has been issued as a bonus. At

the time that stock was issued there was no property of any kind on the asset side to balance that issuance of $3,500,000 of common stock.

Mr. Priest: Now, Mr. Chairman, for the purposes of this argument, you have assumed, as I think you were entitled to assume, that the amount of $3,500,000 had been properly transferred to Account 107.

For the purposes of this argument only, however, we intend to contest that matter, as you know, before the Circuit Court of Appeals for the Ninth Circuit, and it is only fair to say [1416] that we intend to assert to the Circuit Court of Appeals for the Ninth Circuit that there were values, whether tangible or intangible, that were created by the Fleishhackers when they initiated, when they launched this enterprise.

The Chairman: What I am asking you: Whether a prospective purchaser of bonds wouldn't prefer to have the kind of bonds that the Commission proposes to have, rather than the Fleishhackers' value?

Mr. Priest: I think he would prefer to have all the facts before him, and the fact of value is one of the facts he would wish to consider.

Commissioner Seavey: Mr. Priest, do you maintain that if this $3,500,000 is written off of your books that that will affect the value of your property under the principles of Smyth vs. Ames?

Mr. Priest: Not if the principles of Smyth vs. Ames stand. Not—the value for rate making purposes, you mean?

Commissioner Seavey: Any purpose?

Mr. Priest: If Smyth against Ames and the criteria of value provided for in Smyth against Ames continue to be the law of the land, and if the values established pursuant to those criteria continue to be established, perhaps your statement is true.

Commisioner Seavey: It doesn't make any difference what is on your books, does it? [1417]

Mr. Priest: No. It is the purpose, precisely, it is the purpose—this thing goes back again to the purpose for which this Commission and other regulatory authorities propose to use these book costs established pursuant to your classification of accounts.

Commissioner Seavey: We haven't used it yet.

Mr. Priest: No, sir; you haven't, but I again assert: by the very act that you propose to take, the credit of this company has been adversely affected.

Now, just one more point. I haven't attempted to argue, nor do I intend to argue—although we will at some future time, I assume—the fundamental inconsistencies between your instruction 2(b) and the remainder of your classification of accounts.

That was referred to by Mr. Slaff, and, of course, we have no intention of entering into that discussion at the moment, but I would close with this note: In addition to the reference that we already have made to the taking of the property of the Northwestern Electric Company, how can this question be begged? How can it conceivably be begged? Certainly the order that the Commission proposes

to enter in this case will take the property of the American Power & Light Company, which purchased the stock of the Northwestern Electric Company at arms length on the open market for value, without notice of any infirmity. [1418]

How can the question possibly be avoided that by the order that was originally incorporated in your order of December 6, 1940, you will deprive that stock of substantial value in the hands of American Power and Light Company? Thank you.

Mr. Laing: Mr. Chairman, before we adjourn, I would like to straighten one little reference to some figures on the record. They have no great significance except as a matter of information of the Commission.

We were talking about these market quotations of this common stock at various periods, and referring to them in my argument this morning I confused the two periods to some extent. The market price of that stock at the time the American bought it, or three or four months before it bought it, rose from thirty-four dollars to forty-seven or forty-eight dollars a share. That was in the early part of 1925.

When we were trying to find out, trying to present evidence, in accordance with our understanding of the requirements of the classification of accounts, as to what the value of the consideration was that was given by the company to the Fleishackers for their services, we dug up the market quotations on that stock at that time—it was around 1915—

which was the time the stock came on the market—the quotations at that time ran from $15.50 to $25 a share, and we felt prior to this hearing and prior [1419] to the Commission's determination that there was an amount to be put into Account 107, that we were required to ascertain what the value was that the company gave to the Fleishackers.

Mr. Slaff and we argued considerably—and I think the Examiner and the Commission have taken exactly the opposite point of view—that it is not the value of what the company gave to the Fleishackers but the value of what the company got from the Fleishackers, so that for the purposes of this discussion and this argument today we have accepted the Commission's ruling on the subject, but when counsel accuses us of being adaptable because we accept the record situation as we find it, I think he is exaggerating, or rather overlooking circumstances that accounted for it in that particular.

The Chairman: The hearing will stand adjourned.

(Whereupon, at 1:45 p. m., May 21, 1941, the hearing was closed.) [1420]

United States of America
Federal Power Commission

Docket No. IT-5642

In the Matter of

NORTHWESTERN ELECTRIC COMPANY

OPINION NO. 56-A

By the Commission:

By Opinion No. 56 and order entered on December 6, 1940, the Northwestern Electric Company was required to make certain reclassification and other adjustments to its plant accounts. Among other things, the Company was required to reclassify the amount of $3,500,000, found to be a write-up of its plant accounts,[1] to Account 107, Electric Plant Adjustments, which amount was then ordered amortized as follows (paragraph 2(a)):

> "For each year, commencing with the calendar year 1940, it shall credit Account 107, Electric Plant Adjustments, and charge Account 414, Miscellaneous Debits to Surplus, with a sum equal to its net income (Account 400, Credit

[1]The $3,500,000 is an amount placed by Northwestern in its Organization Account actually only to balance the same amount of its outstanding common stock. In our Opinion we found, among other things: "The issue of the Common Stock was a disguised gift by the promoters to themselves," and "No electric plant was received in exchange for the Common Stock; hence, no amount in respect thereof should remain in the electric plant accounts. The issuance of this stock was manipulation."

Balance Transferred from Income Account, less its Preferred Stock Dividend appropriations for each such calendar year until the amount of $3,500,000 shall have been entirely extinguished." [1422]

On December 30, 1940, we entered an order, upon application of the Company, staying the order of December 6, 1940, pending the application for rehearing which the Company indicated it proposed to file, the stay providing, inter alia, that the "Northwestern Electric Company shall not declare or pay any dividends upon any shares of its common stock or make any other distribution on any shares of its common stock except as might be lawfully declared and paid after fulfilling the requirements of the provisions of paragraph 2(a) of the Commission's order * * * adopted December 6, 1940."

On January 9, 1941, the Northwestern Electric Company filed an application for rehearing. By our order dated January 21, 1941, rehearing was granted for the purpose of permitting the presentation of a plan for the disposition of the amount of $3,500,000 classified as a write-up by our order of December 6, 1940, in Account 107, and denied as to all other matters.[2]

[2]Subsequently, certain parts of our order of December 6, 1940, were appealed to the United States Circuit Court of Appeals, Ninth Circuit, which affirmed our order in an opinion dated February 13, 1942.

The American Power and Light Company, holder of all the common stock of the Northwestern Company, was authorized to intervene in the proceedings by order of January 28, 1941.

The rehearing was held before an Examiner on March 3 and 4, 1941, at Portland, Oregon, and oral argument took place before the Commission en banc on May 21, 1941, in Washington, D. C. At the rehearing, the Company announced that the only plan [1423] of "disposition" if advocated was the "retention" of the amount of $3,500,000 in Account 107. Its position on this point is well epitomized by the statement of its counsel during oral argument that "* * * our only plan of disposition, if you want to call it that, was one of indisposition to do anything about it."

The evidence offered by Northwestern at the rehearing related chiefly to earnings available for capital stock for the years 1921-1940, inclusive, estimated cost of reproduction of the properties and business of Northwestern Electric Company as of December 31, 1924, December 31, 1932, December 31, 1935, and June 30, 1940, and schedules of the Company's residential rates. The Examiner rejected this evidence but permitted counsel to make an offer of proof.

Intervener presented evidence as to the amount paid by American Power & Light Company in 1925 for the 100,000 shares of the common capital stock of Northwestern Electric Company, a list of the holders of such stock prior to the transfer to American Power & Light Company, the market quotations

of such stock for the year 1925, and certain documents relating to a stockholders' suit, the last two items being received in evidence over objection of Commission Counsel.

The Commission staff presented no evidence at the rehearing, its evidence as to a plan of disposition having been presented at the initial hearing. [1424]

We have reviewed the valuation evidence offered by the Company and by intervener, and are of the opinion that it is entirely irrelevant and immaterial to the issue of the rehearing, viz., the presentation of a plan of disposition of the $3,500,000 write-up.

It is asserted that we may not require the amortization of the $3,500,000 write-up, inasmuch as the alleged present fair value of the property and assets of the Company exceeds the recorded amount for such property and assets, including this amount of $3,500,000. Reduced to its simplest terms, the Company urges that its property account can be written up at will so long as it is able to support such manipulation by evidence of present fair value. By the same reasoning, it would follow that the plant accounts should be written down every time there is a decrease in plant values. The recognition in the plant accounts of declines in the so-called fair value of properties during the recent long and severe depression would probably have brought disaster to most public utilities. The amounts to be honestly and properly recorded in a utility's plant account, should not be permitted to oscillate with the ebb and flow of economic tides.

It is thus erroneous to permit the Company's plant accounts to reflect changing "values" of the nature offered in evidence here and to use such estimates of "value" in lieu of valid cost. Adherence to such a principle, with its ever shifting plant values, would nullify the effective regulation of public utilities. [1425]

Cost, not value, is the fundamental basis of accounting for public utility plant, as well as for plant of other enterprises. Our System of Accounts, like all accounting systems prescribed by regulatory agencies, is grounded firmly in the cost principle.

In this proceeding we are concerned solely with the proper disposition of what has heretofore been determined to be a fictitious element in the accounts of the company. The amount of $3,500,000, which we have found to be a bold, deliberate write-up, is not a valid or legitimate cost and has no place in the accounts of an operating public utility company. The amount must be disposed of if sound accounting practices are to prevail. The only question remaining is the manner of disposition.

Under the circumstances, it would be entirely proper, as far as accounting principles are concerned, to order the $3,500,000 item to be charged at once to the earned surplus of the company. In our Opinion and order entered December 6, 1940, we did not dispose of the amount in that manner for the reason that to have done so would have created a large deficit in the surplus account, with the consequent detriment to the preferred stockholders. We

were cognizant of the fact that the preferred stockholders had paid some $1,800,000 into the Company (in contrast to the common stockholders who paid nothing into the Company for the common stock and that some means, if possible, should be found to protect their interests. Our order, in effect, contemplates a charge, or series of charges, to earned surplus over a period of years in [1426] the future and thus avoids the creation of a present deficit. We believe this requirement to be reasonable and in the public interest; it will result in the elimination of inflation in the accounts of the company.

This is not to say that other disposition plans might not meet the exigencies of the situation had they been proposed by the Company; but the complete indisposition of Northwestern to suggest any plan of disposition obviates our considering them here. Cf. Alabama Power Company v. Federal Power Commission, (No. 7853, decided March 30, 1942) App. D. C.[3]

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[3] In this case the United States Court of Appeals for the District of Columbia stated, inter alia:

"Obviously, the Commission was acting within the scope of its authority and probably performing its administrative duty when it required the Company to remove the disallowed items from the project account. Where, then, shall they be put? The Commission says, in the earned surplus account. The Company has been unable to suggest any other. * * *

"It is apparent, therefore, that the Company has been afforded every reasonable opportunity to present an issue upon the question, to be heard thereon,

It is urged that the disposition of the $3,500,000 write-up, classified in Account 107, violates the Fifth Amendment to the Constitution of the United States, in that it deprives the [1427] Company and the holders of its securities of its and their property without due process, and takes its and their property without just compensation. There is no basis for this contention—neither Northwestern Electric Com-

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and to discharge the burden of proof which the statute imposes upon it of justifying any accounting entry which it chooses to make. Instead, it chose to challenge the indisputable powers of the Commission; it not only failed to take advantage of the various opportunities, and to shoulder its burden, but stated its inability and unwillingness to do so. Consequently, it has foregone the opportunity to question the propriety of the order. * * *

"Under these circumstances, it is clearly sufficient, as against the Company's protest, that the disallowed items shall find lodgment in the account specified by the Commission. * * * After all, the Commission has many duties to perform, over a long period of time, other than coaxing a reluctant licensee to act as the law requires that it shall act.

* * * * * * * *

"There is no showing that the Commission overstepped the bounds of its administrative powers or that its orders are entirely or in any wise at odds with fundamental principles of correct accounting. . . . On the contrary, there has been no suggestion of any possible alternative to that proposed by the Commission, although the opportunity to do so has been long open. There has been no denial of due process; no lack of notice; no deprivation of fair hearing; and no action by the Commission which was not entirely within its jurisdiction and the scope of its duty as imposed by the statute."

pany nor its security holders are being divested of any property.[6] The Company's revenues and net income will not be diminished in the slightest by reason of writing out the inflationary item from its accounts. [1428]

It is also claimed that the disposition of the $3,500,000 write-up will have an adverse effect on the Company's credit standing and upon the interests of the holders of all of its securities. The argument is specious. Creditors and security holders will obviously be benefited by the removal of inflation from the Company's accounts, and by having genuine assets supporting the common stock of the Company.

Based upon the evidence in this case, including that offered at the hearing of March 3 and 4, 1941, we adhere to our original Opinion and order and find that the $3,500,000 write-up classified in Account 107, Electric Plant Adjustments, should be disposed of by charges to surplus in annual amounts equal to the Company's annual net income less preferred stock requirements, until the entire amount has been extinguished.

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[6] "Supposing, however, that the enforcement of the accounting system does require them [preferred stockholders] to forego their current dividends, we do not concede that this amounts to an unlawful taking of their property." Kansas City Southern Railway v. United States, 231 U. S. 423, 453. See also Northern States Power Company v. Federal Power Commission, 118 F. (2d) 141; Alabama Power Company v. Federal Power Commission, No. 7853, decided March 30, 1942, App. D. C.

An appropriate order in conformity with our Opinion and findings will be issued.

LELAND OLDS,
Chairman.
CLAUDE L. DRAPER,
Commissioner.
BASIL MANLY,
Commissioner.
JOHN W. SCOTT,
Commissioner.
CLYDE L. SEAVEY,
Commissioner.

Dated at Washington, D. C., this 14th day of April, 1942.

LEON M. FUQUAY,
Secretary. [1429]

[Title of Board and Cause.]

ORDER AFFIRMING COMMISSION'S OPINION NO. 56 AND ITS ORDER OF DECEMBER 6, 1940, RE DISPOSITION OF AMOUNTS IN ACCOUNT 107.

Upon consideration of the previous orders in this proceeding, all evidence adduced of record, including the evidence on rehearing, the oral argument with respect to the rehearing; the briefs and other documents filed, and having on this date made and entered its Opinion No. 56-A, which is incorporated by reference as a part

hereof, adhering to its Opinion No. 56 and its order of December 6, 1940, with respect to the disposition of amounts in Account 107;

The Commission orders that:

(A) Northwestern Electric Company make the following disposition of the amounts recorded in Account 107, Electric Plant Adjustments, as directed in this Commission's order of December 6, 1940:

For each year, commencing with the calendar year 1940, it shall credit Account 107, Electric Plant Adjustments, and charge Account 414, Miscellaneous Debits to Surplus, with a sum equal to its Net Income (Account 400, Credit Balance Transferred from Income Account) less its Preferred Stock Dividend appropriations for each such calendar year until the amount of $3,500,000 shall have been entirely extinguished;

(B) Northwestern Electric Company file with the Commission certified copies of the journal entry required by paragraph (A) above, on or before June 1, 1942, and on April 1 of each year thereafter, as required.

By the Commission.

LEON M. FUQUAY,
Secretary. [1430]

Received May 11, 1942.

United States of America
Before the
Federal Power Commission

In the Matter of

Northwestern Electric Company
Docket No. IT-5642.

APPLICATION FOR REHEARING

Northwestern Electric Company (hereinafter sometimes called the "Northwestern Company") and American Power & Light Company (hereinafter sometimes called the "American Company") which was authorized to intervene in this proceeding after the entry of the Commission's original order herein, being aggrieved by the order (hereinafter sometimes referred to, with the "Opinion," being the Commission's Opinion No. 56-A, on which such order is based, as the "Order") in the above-entitled proceeding dated April 14, 1942, respectfully apply, pursuant to the provisions of Section 313(a) of the Federal Power Act (hereinafter sometimes referred to as the "Act"), for a rehearing in said proceeding on the following specific grounds:

1. The Commission erred (a) in approving the ruling of its Examiner, at the rehearing held in this matter on March 3 and 4, 1941, rejecting evidence offered on behalf of both the Northwestern Company and the American Company (1) as to net in-

come available for dividends on Northwestern Company's capital stock for the years 1922 to 1940 (Ex. No. 79; R. 1225-1236); (2) as to the Northwestern Company's income and earned surplus for the twelve months ended December 31, 1940 (Ex. No. 80; R. 1236-1239); (3) as to the average price per kilowatt hour received by the [1432] Northwestern Company from its residential customers, for the years 1922 to 1940, compared with the national average for the same period (Ex. No. 85; R. 1246-1249; (4) as to the average consumption of kilowatt hours by residential customers of the Northwestern Company, for the years 1922 to 1940, compared with the national average for the same period (Ex. No. 86; R. 1249-1250); and (5) as to the reproduction cost of the property of the Northwestern Company as of December 31, 1924, December 31, 1932, December 31, 1935 and June 30, 1940 (R. 1259-1271); and (b) in holding that such evidence was irrelevant and immaterial to the issue of the rehearing.

II. The Commission erred in stating that "the Company urges that its property account can be written up at will so long as it is able to support such manipulation by evidence of present fair value." In this connection, the only revision in the Northwestern Company's plant account made subsequent to its organization period was a revision downward by $6,500,000, effected on the basis of a careful appraisal by a thoroughly qualified independent engineer. This reorganization was

consummated pursuant to authority conferred upon the officers of the Company by its stockholders and directors (R. 1316-1322) and obviously was required to be predicated upon the then fair value of the Company's assets. After this reorganization had been effected, the officers of Northwestern Company believed that its balance sheet conservatively represented values which were inherent in the Company's property.

References in the Commission's opinion to the asserted impropriety of permitting amounts recorded in a utility's plant account "to oscillate with the ebb and flow of economic tides", and to the application of a "principle" of "shifting plant values" which "would nullify the effective regulation of public utilities", patently are without even rhetorical relevance here, unless the accounts of the Northwestern Company, after the completion of the Commission's "adjustments", are to be used for rate regulatory purposes. If that is the Commission's intention, it is in error in assuming that "neither Northwestern Electric [1433] Company nor its security holders are being divested of any property" by the elimination of recorded values fully represented by the present fair value of the Northwestern Company's property. So far as effective regulation is concerned, the rates of the Northwestern Company are, as the Commission well knows, among the lowest charged by any investor-owned utility in the United States and neither the Northwestern Company nor any other

public utility is beyond the reach of "economic tides."

The question here presented is whether this Commission may "within the ambit of its statutory authority" disregard the present fair value of property represented by an asset account and require such account to be written off by debits to surplus, thus directing the Company to write off from its book values a loss which it has not sustained, and whether, in this connection, the Commission may, in effect, determine (a) that the Common Stock of the Northwestern Company has not been lawfully issued for what the Commission deems to be adequate consideration; (b) that such stock is not valid in the hands of an innocent purchaser for value, and (c) that such innocent purchaser for value shall contribute the full par value of such stock.

As stated by counsel for the Northwestern Company, "the only disposition that could be made of that $3,500,000, assuming it was to go into Account 107, was that it be retained there, because it reflected value in the assets of the Company in excess of other liabilities" (R. 1326). In the light of the determinations made by the Company's stockholders and directors when, pursuant to its 1936 reorganization, the par value of its Common Stock was reduced from $10,000,000 to $3,500,000, the Northwestern Company could not conceivably have taken any other position.

III. The Commission erred in holding that the

amount of $3,500,000 here under consideration "must be disposed of if sound accounting practices are to prevail." In this connection, the Applicants respectfully urge that, even though no contention was made (R. 1313) that the Northwestern Company received either cash or physical property for any of its Common Stock, the Company did receive [1434] from its organizers, in consideration for such Common Stock, services of very real value which put the Company in readiness to do business as a successful going concern. It is common knowledge that it was the almost universal practice, at the time that the Northwestern Company was organized, to issue common stock to represent the entrepreneurs' or equity interest in corporate enterprises initiated by persons who had developed a plan and, by ability, energy and willingness to incur personal financial risks, had translated that plan into action. If it is "sound accounting practice" to require corporations to dispose of substantially all intangible plant account items, i.e., to write off substantially every dollar in excess of actual cash or tangible property received in consideration for securities issued, then the balance sheets of American corporations large and small, as well as the validity of their issues of capital stock in the hands of innocent purchasers, are in grave jeopardy. What can the Commission accomplish which is "necessary or appropriate for purposes of administration" of the Act by requiring the writing-off of this particular asset account that could not be ac-

complished equally well by requiring the intangible character of this asset to be identified and segregated on the Company's books? If the Commission's purpose is to determine original cost, perhaps pursuant to the provisions of Section 208 of the Act, that objective will be realized by requiring a segregated statement, on the Company's books, of what the Commission conceives to be such original cost. However, the Commission has gone beyond such a conceivably legitimate exercise of its regulatory authority to the usurpation and arrogation of judicial powers which the Congress obviously did not intend to confer upon it.

IV. The Commission erred in finding that the Common Stock of the Northwestern Company was issued without consideration by reason of the mere absence of conclusive evidence of the value of such stock on the specific date of its issuance. To require or impose such an impossible burden of proof deprives the Northwestern Company and its security holders of its and their property without due process of law. [1435]

V. The Commission erred in ordering the $3,500,000 here under consideration to be disposed of by debits to surplus equalling each year's net income, less preferred stock dividend appropriations. In this connection, the Applicants urge that this required disposition: (a) is unreasonable and arbitrary, is not consistent with the public interest and is contrary to the best interests of investors in and the consumers of Northwestern Company; (b) ig-

nores the Northwestern Company's substantial existing surplus and provides for a whimsical and arbitrary "write-off" or amortization schedule wholly lacking any factual basis; (c) jeopardizes future dividends upon the Northwestern Company's preferred stock, for the reason that, if that Company's capital were, in fact, "impaired," so as thereby to necessitate the cessation of common stock dividends, such "impairment" would also prevent the payment of preferred stock dividends (Sec. 3803-24, Rem. Rev. Stat. of Washington, 1940 Supp; see also Randall v. Bailey, 23 N. Y. Supp. (2d) 173); (d) represents the purported exercise of powers which are not granted to the Commission by the Act power to exercise any regulatory authority over the payment of dividends on the stock of Northwestern Company having been delegated, so far as any possible Federal control over the dividends of the Northwestern Company (a subsidiary of a registered holding company) is concerned, to the Securities and Exchange Commission (Public Utility Holding Company Act of 1935, Section 12(c)) rather than to this Commission; (e) invades powers reserved to the states by the provisions of the Act and by Article X of the Amendments to the Constitution of the United States; (f) is not supported by substantial or any evidence and is, in this as in other respects, arbitrary and capricious; and (g) requires the writing-off on Northwestern Company's books of values inherent in the recorded cost of its property wholly without regard

to the decision of the United States Circuit Court of Appeals for the Ninth Circuit in this case that the "system of accounts takes nothing" from the Northwestern Company and that the "present regulation only requires a particular system of accounts to be kept, not that other systems shall not be kept." The Commission's order there- [1436] by violates Article V of the Amendments to the Constitution of the United States in that it deprives the Northwestern Company and the American Company, as the owner of securities of the Northwestern Company, of property without due process of law and takes their property for public use without just compensation.

The Commission's order further is arbitrary and unreasonable in that it requires the amortization of said amount of $3,500,000 out of the Northwestern Company's net income, less its preferred stock dividend appropriations, and thus is inconsistent with the Commission's opinion, which contemplates that provision shall be made for the Company's preferred stock dividend requirements before the amortization formula is applied. Under the Commission's order, if the directors of the Northwestern Company were proceeding cautiously and were, for example, because of insufficient cash or other limitations, able to declare and pay only one-half of the Company's current preferred stock dividends, the income reserved would not be added to surplus and thus become available at some future time for the payment of preferred stock dividend

arrears, but would be wiped out by the amortization requirements of said order. It is assumed that the use of "appropriations" rather than "requirements" in the Commission's order was inadvertent and that the Commission will not wish to impose such a serious and unfair burden on the Northwestern Company's preferred stockholders.

VI. The Commission erred in holding that its disposition order does not deprive the Northwestern Company and the holders of its securities of its and their property without due process and does not take its and their property without just compensation. Without attempting to argue in detail the inapplicability to the facts of this situation of the cases cited by the Commission in this connection, Applicants raise one quite pragmatic consideration: We submit that if, for example, some Federal agency were to hold (a) that no dividends could be paid for a period of ten years on the capital stock of Monsanto Chemical Company and (b) [1437] that all of the Company's earnings for that period which might otherwise have been paid as dividends on such capital stock were required to be "frozen," so that such earnings could never become available for dividend purposes, the holders of such stock would very definitely be divested of their property. And we also respectfully urge that, in such circumstances, the market value of the Common Stock of the Monsanto Chemical Company would immediately shrink to a minor fraction of what had been its market value immediately prior to the issuance of such an order.

VII. That the Commission's order, in its entirety (a) is based upon a mistake of law arising out of the Commission's misconstruction of the statute under which it purports to act; (b) assumes to exercise powers not granted, or conceivably intended to be granted, to the Commission by the Congress; and (c) is contrary to the express provisions of the Act, particularly Sections 19, 20, 201, 207, 301(a) and 318 thereof, which limit the jurisdiction of the Commission. In this connection, the Applicants respectfully allege that the Northwestern Company is a corporation organized and existing under the laws of the State of Washington; that the courts of that State alone have jurisdiction to determine the validity of the issuance of the capital stock of Washington corporations and the adequacy of the consideration received therefor or to take action to enforce payment of an allegedly unpaid stock subscription; that the rights of the American Company as the holder of 100,000 shares of the validly-issued, fully-paid and non-assessable Common Stock of the Northwestern Company have been determined by a court of competent jurisdiction of the State of Washington (Ex. No. 89, R. 1285-1292) and that neither the Northwestern Company nor any security holder thereof could successfully attack the validity of the Northwestern Company's Common Stock in the hands of American Company, which was and is an innocent purchaser thereof for value.

VIII. That the Commission's order is erroneous

in that: (a) it rests upon the assumption that the $3,500,000 which [1438] now represents the Common Stock of the Northwestern Company must be attributed entirely to the electrical facilities, operations and values of the Northwestern Company, without consideration of its non-electrical properties, operations and values, over which the Commission has no jurisdiction, such an assumption doing violence to the facts and not being supported by substantial or by any evidence; and (b) it is based upon a mistake of law in that the Commission attempts retrospectively to apply the provisions of the Act and the regulatory powers therein granted. The Act does not provide for or authorize any such retrospective application and does not authorize or contemplate the issuance of an order to write off book capital which, at the time, is represented by assets of equivalent value.

IX. That the effect of the Commission's order is to determine, and deprive the Applicants of, vested property rights; that the Applicants were entitled at least to an independent judicial review of such administrative determination as to both facts and law and that Section 313(b) of the Act to the extent that it does not grant such independent judicial review as to facts, is unconstitutional as depriving Applicants of their property without due process.

X. That the Commission's order is erroneous and is beyond the authority conferred upon the Commission by the Act in that such order requires

an enforced additional investment of $3,500,000 by the American Company in the Common Stock of the Northwestern Company, for which the American Company has already paid $5,021,799.33 (R. 1274).

XI. That the essentially arbitrary and capricious character of the Commission's order is indicated by the testimony of Mr. Charles W. Smith (in response to a series of hypothetical questions on cross-examination; R. 393-400) that if Company "A" had constructed a hydro-electric development at the price levels prevailing in 1913-15 and such development had been purchased by Company "B" on the [1439] basis of the higher price levels prevailing in 1925-26, the difference (assumed to be $50,000) between the original cost of such development and its cost to Company "B" representing enhanced structural value would be recorded in Account 100.5 and disposed of by amortization over the life of the property; but that, on the other hand, if "B" Company, instead of buying the physical property of "A" Company, purchased its common stock under similar circumstances with respect to changes in price levels, thus enabling "B" Company to take advantage of the enhanced structural value of the property of "A" Company, the resulting "write-up", as he termed it, should, upon the merger of Companies "A" and "B", be disposed of at once, or in as short a period as possible. In this connection, the attention of the Commission is respectfully directed to the Applicant's offer of proof (R. 1269-1270) that "the enhancement in

the structural value as of December 31, 1924 of the property of the Northwestern Electric Company existing on that date, over the structural value of such property as of the respective dates on which such property was first placed in operation, was not less than $3,250,000, giving full consideration to the depreciation which may have accrued on such property as of December 31, 1924."

XII. The Applicants hereby incorporate by reference the transcript of the oral argument of their counsel before the Commission en banc on May 21, 1941, at Washington, D. C., as a part of and in support of this Application and refer to said transcript for a more particular statement with respect to certain of the issues herein presented.

Wherefore, said Northwestern Electric Company and said American Power & Light Company respectfully request that the Commission grant a rehearing in respect to the above-entitled proceeding; that the said Opinion and Order adopted and entered in said proceeding be abrogated; that the Commission's Order herein be stayed until a reasonable time after the Commission shall have acted upon this ap- [1440] plication for rehearing and that the Applicants be granted such other and further relief as may seem just and proper in the premises.

Respectfully submitted,

NORTHWESTERN ELECTRIC COMPANY

[Seal] By JOHN A. LAING
Vice-President.

Attest:

C. W. PLATT
Secretary.

AMERICAN POWER & LIGHT COMPANY

[Seal] By L. H. PARKHURST
Vice-President.

Attest:

C. W. SCHOLZ,
Asst. Secretary.

LAING, GRAY & SMITH,
By: JOHN A. LAING,
HENRY S. GRAY,
Public Service Building,
Portland, Oregon;
REID & PRIEST,
By: A. J. G. PRIEST,
SIDMAN P. BARBER,
Two Rector Street,
New York, New York.
Counsel. [1441]

State of Oregon
County of Multnomah—ss.

I, John A. Laing, being first duly sworn, on oath, do state that I am the Vice-President of Northwestern Electric Company, one of the Applicants herein; that I have read the foregoing application for rehearing and know the contents thereof; and that said application and the statements therein made are true to the best of my knowledge and belief.

JOHN A. LAING

Subscribed and sworn to before me this 7th day of May, 1942.

[Seal] JEAN McGILCHRIST
Notary Public for Oregon
My commission expires Aug. 2, 1944

State of New York.
County of New York—ss.

On the 9th day of May in the year 1942, before me personally came L. H. Parkhurst to me known, who, being by me duly sworn, did depose and say that he resides in Montclair, New Jersey; that he is the Vice-President of American Power & Light Company, the corporation described in and which executed the above instrument; that he knows the seal of the corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

[Seal] SAMUEL AUSTRIAN
Notary Public.
N. Y. Co. Clk's No. 183, Reg. No. 3A238
Commission expires March 30, 1943 [1442]

Copy

(Docketed May 22, 1942)

Docket No. IT-5642

Northwestern Electric Company

May 22, 1942.

Reid & Priest
2 Rector Street
New York, New York

Gentlemen:

This will acknowledge receipt on May 12, 1942, of document entitled "Application for Rehearing" in the above-entitled matter.

Please be advised that this document cannot be accepted for filing by the Commission since the Commission's Opinion No. 56-A and Order thereon were issued upon a previous rehearing held in this matter. There is no provision in the Federal Power Act or the rules of this Commission for a rehearing of a rehearing. Please be advised, therefore, that as far as this Commission is concerned your time for appeal from the Commission's Opinion No. 56-A and Order of April 14, 1942, will expire 60 days after such Order, since such Order was an Order of the Commission upon your application for rehearing in this case.

Very truly yours,

(Signed) LEON M. FUQUAY,

Secretary.

cc: Laing, Gray Smith
Leighton & Gamble

GS: VEF
5-14-42

[1443]

NORTHWESTERN ELECTRIC COMPANY

Public Service Building

Portland, Oregon

100-2
5642
Formal

CERTIFICATE RE JOURNAL ENTRIES

F. P. C. Docket No. IT-5662

(Stamped):
Docketed: May 25, 1942.
Received: May 25, 1942.

To the Federal Power Commission:

I, C. W. Platt, Secretary and Treasurer of Northwestern Electric Company, a Washington corporation, hereby certify that the Journal Entries, hereto attached, and numbered 19907, 19908 and 19909, are true and correct copies of Journal Entries recorded on the books of account of said corporation, on and as of the respective dates shown thereon.

[Seal] C. W. PLATT,
Secretary-Treasurer of Northwestern Electric Company.

Portland, Oregon
May 22, 1942 [1444]

May 6, 1942
as of December 31, 1936

Journal Entry Voucher No. 19907

100.11 (F.P.C. 100.1) Utility Plant in Service—Electric..... 11,300,033.96

Account Number	Oregon	Washington	Unallocated between States	
302		839.71		839.71
320		152,491.07		152,491.07
321		243,573.03		243,573.03
322		1,278,934.92		1,278,934.92
323		99,280.06		99,280.06
324		106,051.64		106,051.64
325		9,676.23		9,676.23
326		30,431.99		30,431.99
340	104,719.41	54,991.58		159,710.99
341	9,119.37	239.41		9,358.78
342		21,411.84		21,411.84
343	236,883.15	220,276.96		457,160.11
344	59,992.18	17,177.72		77,169.90
345	163,916.95	199,019.02		362,935.97
346	164,259.64	197,064.46		361,324.10
348	148,332.52	54,862.70		203,195.22
350	51,118.79	12,889.57		64,008.36

NORTHWESTERN ELECTRIC COMPANY

.....19..... Journal Entry Voucher No. 19907

Account Number	Oregon	Washington	Unallocated between States		
351	92,170.21	597.93		92,768.14	
352	996,733.11	177,015.63		1,173,748.74	
354	807,302.23	251,297.26		1,058,599.59	
355	1,008,421.19	219,171.04		1,227,592.23	[1445]
356	780,987.93	1,002.47		781,990.40	
357	738,967.13	2,119.11		741,086.24	
358	742,633.65	143,847.68		886,481.33	
359.1	353,564.83	67,221.37		420,786.20	
359.2	364,472.56			364,472.56	
360	503,284.05	72,794.70		576,078.75	
361	8,744.62			8,744.62	
362	1,043.09			1,043.09	
363	151,170.19	14,475.39		165,645.58	
370.3		11,611.28		11,611.28	
371.2		5,514.71		5,514.71	
371.3		15,535.00		15,535.00	
372		13,595.50		13,595.50	
373		41,661.13		41,661.13	
374		1,024.78		1,024.78	
375		220.60		220.60	

.....19.... Journal Entry Voucher No. 19907

Account Number	Oregon	Washington	Unallocated between States			
376	43,105.61	1,640.45		44,746.06		
377		12,600.71		12,600.71		
378	7,990.43	8,483.01		16,473.44		
379		459.36		459.36		
Total Acct. 100.11)	7,538,932.84	3,761,101.12				
100.12 (F.P.C. 108.1) Utility Plant in Service—Steam						1,243,266.50
1349	154,893.09			154,893.09	[1446]	
1354	774,776.85			774,776.85		
1359	153,689.63			153,689.63		
1360	75,447.62			75,447.62		
1361	84,459.31			84,459.31		
Total Acct. 100.12	1,243,266.50					
100.13 (F.P.C. 108.2) Utility Plant in Service—Common						4,426,886.24
301			5,798.46	5,798.46		
302	432.43			432.43		

NORTHWESTERN ELECTRIC COMPANY

.....19.... Journal Entry Voucher No. 19907

Account Number	Oregon	Washington	Unallocated between States	
303			109,583.55	109,583.55
310	181,768.51			181,768.51
311	868,387.08			868,387.08
312	1,269,838.27			1,269,838.27
314	1,116,205.55			1,116,205.55
315	263,929.23			263,929.23
361	105,816.19			105,816.19
370.3	71,339.11			71,339.11
371.2	5,227.61			5,227.61
371.3	166,549.95			166,549.95
371.7	291.35			291.35
372	128,595.04			128,595.04
373	73,921.93			73,921.93
374	7,835.14			7,835.14
375	5,871.87			5,871.87
377	40,527.83			40,527.83
379	4,967.14			4,967.14
Total Acct. 100.13	4,311,504.23		115,382.01	

[1447]

NORTHWESTERN ELECTRIC COMPANY

May 6, 1942

As of December 31, 1936

Journal Entry Voucher No. 19907

Account Number	Oregon	Washington	Unallocated between States		
100.4 (F.P.C. 100.4) Utility Plant Held for Future Use—Electric					41,616.37
Block 82					
Albina	35,003.45			35,003.45	
352	6,612.92			6,612.92	
Total Acct. 100.4	41,616.37				
107.1 (F.P.C. 107) Utility Plant Adjustments—Electric					3,744,030.74
158.14		80.87	3,743,953.47	3,744,030.74	
107.2 (F.P.C. 108.3) Utility Plant Adjustments—Steam					20,048.38
20,048.38				20,048.38	

Entered: .....

Certified Correct: .....

Approved:

C. W. PLATT.

Treasurer.

NORTHWESTERN ELECTRIC COMPANY

May 6, 1942

As of December 31, 1936 — Journal Entry Voucher No. 19907

Account Number		Oregon	Washington	Unallocated between States	
110	Other Physical Property				253,506.57
		253,506.57	253,506.57		
126.2	Accounts Receivable from, Associated Interests				9.75
	Pacific Power & Light Company	9.75			
100.6	Electric Plant in Process of Reclassification				21,029,369.96
		13,512,153.31	7,517,216.65	21,029,369.96	
250.1	(F.P.C. 250) Reserve for Depreciation of Utility Plant—Electric				28.55

Reclassification of Plant as of December 31, 1936 As determined by the Federal Power Commission in Docket IT 5642 and Public Utilities Commissioner of Oregon and required by orders of the Federal Power Commission dated December 6, 1940, and February 12, 1941, the judgment of the U.S. Circuit Court of Appeals for the 9th Circuit, entered February 13, 1942, and letter of the Public Utilities Comm. of Oregon, dated 5/5/42. **[1448]**

Entered: Certified Correct: Approved:

C. W. PLATT.

Treasurer

NORTHWESTERN ELECTRIC COMPANY

May 6, 1942
As of December 31, 1936

Journal Entry Voucher No. 19908

151	Capital Stock Expense	243,953.47	
271	Earned Surplus	77.27	
107.1	(F.P.C. 107) Electric Plant Adjustments		244,030.74
	Unallocated between states	244,030.74	

To transfer the amount of $253,953.47 representing expenses in connection with the sale of Preferred Stock to Account 151, Capital Stock Expense and to transfer to Account 271 Earned Surplus an amount of $77.27 representing miscellaneous payroll charges, telephone and telegraph, which were determined to be improperly charged to transmission lines. See Joint Report of Public Utilities Commissioner of Oregon and Federal Power Commission, dated April 26, 1940. [1449]

Entered: ..... Certified Correct: .....

Approved:

C. W. PLATT.
Treasurer

Federal Power Commission
1197

NORTHWESTERN ELECTRIC COMPANY

May 6, 1942
As of December 31, 1936

Journal Entry Voucher No. 19909

151	Capital Stock Expense	19,409.88	
271	Earned Surplus	638.50	
107.2	(F.P.C. 108.3) Steam Plant Adjustments Oregon		20,048.38

To transfer the amount of $19,409.88 representing expenses in connection with the Sale of Preferred Stock to Account 151 Capital Stock Expense and to transfer to Account 271 Earned Surplus, an amount of $638.50, representing expenses in connection with the Steam Heat Franchise incurred during the year of 1913. See joint report of Public Utilities Commissioner of Oregon and Federal Power Commission, dated April 26, 1940.

Entered: ..... Certified Correct: ..... Approved:

C. W. PLATT.
Treasurer. [1450]

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 10161

NORTHWESTERN ELECTRIC COMPANY and AMERICAN POWER & LIGHT COMPANY,

Petitioners,

vs.

FEDERAL POWER COMMISSION,

Respondent.

CERTIFICATE

I, Leon M. Fuquay, Secretary of the Federal Power Commission and official custodian of the records of said Commission, do hereby certify that the attached are true copies of:

1. Application for continuance and for change of place of hearing filed January 30, 1941;
2. Application for continuance filed by American Power & Light Company on January 30, 1941;
3. Application for continuance of date on which accounting entries are to be made filed January 30, 1941;
4. Order changing date and place for rehearing entered February 1, 1941;
5. Order changing date for making accounting entries entered February 12, 1941;
6. Designation of Trial Examiner Law to preside at hearing filed February 27, 1941;

7. Transcript of hearings held March 3 and 4, 1941;
8. Exhibits Nos. 79, 80, 81, 82, 83, 84, 85, 86, 87, 88 and 89 introduced into evidence at the hearings held March 3 and 4, 1941;
9. Order for oral argument entered April 18, 1941;
10. Order continuing argument entered April 26, 1941;
11. Transcript of oral argument heard May 21, 1941;
12. Opinion No. 56-A and order affirming Commission's Opinion No. 56 and its order of December 6, 1940, re-disposition of amounts in Account 107 filed and entered April 14, 1942;
13. Application for rehearing filed May 11, 1942;
14. Letter dated May 22, 1942, advising counsel for applicants that "Application for Rehearing" can not be accepted for filing;
15. Proposed journal entries filed May 25, 1942;
16. Petition for stay of Commission's order filed May 26, 1942;
17. Order amending date for filing of certified copies of journal entry entered May 26, 1942;

all of which, together with the record, certified on March 17, 1941, and forwarded to this Honorable Court on said date in Cause No. 9756, constitute the record before the Federal Power Commission in the matter of Northwestern Electric Company, Docket No. IT-5642.

In witness whereof I have hereunto subscribed my name and caused the seal of the Federal Power Commission to be affixed this 21st day of July, 1942, at Washington, D. C.

[Seal] LEON M. FUQUAY,
Secretary.

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 10161

NORTHWESTERN ELECTRIC COMPANY and AMERICAN POWER & LIGHT COMPANY,

Petitioners,

vs.

FEDERAL POWER COMMISSION,

Respondent.

PETITION FOR REVIEW OF ORDER OF FEDERAL POWER COMMISSION

To the Honorable The United States Circuit Court of Appeals for the Ninth Circuit, and to the Judges thereof:

Northwestern Electric Company (hereinafter sometimes called "Northwestern Company") and American Power & Light Company (hereinafter sometimes called "American Company"), the Petitioners herein, being aggrieved by the Order of the Federal Power Commission dated April 14, 1942, in the proceeding bearing said Commission's

Docket No. IT-5642, and by the denial of Petitioners' application for rehearing filed therein on May 11, 1942, hereby respectfully petition this Honorable Court, pursuant to Section 313(b) of the Federal Power Act, for a review of said Order of said Commission and its said denial of Petitioners' application for rehearing and respectfully show:

I. Northwestern Company is a corporation of the state of Washington and is doing business as a public utility in [1451] the states of Washington and Oregon under and by virtue of compliance with the laws of said states. The property of Northwestern Company comprises electric and non-electric facilities. All of its non-electric facilities and the major portion of its electric facilities are devoted solely to intra-state uses. Northwestern Company is subject to comprehensive regulation by the authorities of the states of Washington and Oregon as to accounting, rates, adequacy of service, contracts with affiliated interests and every other aspect of its business which concerns the general public.

II. American Company is a corporation of the state of Maine, having an executive office at Two Rector Street, New York, New York. It is a public utility holding company, registered as such, under the Public Utility Holding Company Act of 1935, and owns varying percentages of the outstanding securities of electric utility companies, gas utility companies and certain other companies operating in the states of Washington, Oregon, Montana, Idaho, Minnesota, Wisconsin, Nebraska,

Iowa, Kansas, Missouri, Florida, New Mexico, Arizona and Texas.

American Company owns 100,000 shares of the Common Stock, being all of such Common Stock presently outstanding, and $2,520,000 principal amount of the 4½% Debentures due 1959, being all of such Debentures presently outstanding, of Northwestern Company. In the months of February and March, 1925, American Company acquired in the open market approximately 98% of the Common Stock of Northwestern Company and acquired the remainder of said Common Stock, also in the open market, from time to time thereafter. The actual cost of said Common Stock to American Company was $5,021,799.33, its purchases of such stock having been made from a total of more than 400 persons. American Company acquired said 4½% Debentures, in the principal amount of $2,800,000, in October, 1939, at an actual cost of $2,800,000, but $280,000 principal amount of said Debentures have sub- [1452] sequently been paid off, leaving $2,520,000 principal amount thereof presently owned by American Company.

III. The Federal Power Commission, hereinafter sometimes called "Commission", is the administrative body entrusted with the administration of the Federal Power Act, 16 U.S.C.A. §§ 791 et seq., hereinafter sometimes referred to as the "Act".

The Commission is authorized by the terms of the Act to investigate and ascertain the actual legitimate cost of the property of public utilities and

the fair value of such property, to require that every public utility file a statement of the original cost of its property, to determine the fair value of projects already constructed for which license is sought, and to prescribe a uniform system of accounts to be kept by licensees and public utilities. The Commission is authorized by the terms of the Act to make determinations with respect to certain rates, security issuances, the acquisition or disposition of property, and other matters over which the Commission has jurisdiction, all such regulatory authority being subject, however, to the restrictions and limitations in the Act set forth.

IV. The Commission, by its order Number 42 adopted June 16, 1936, as amended, prescribed its "Uniform System of Accounts," for public utilities and licensees. Said System of Accounts, as supplemented by the Commission's order of May 11, 1937, directed all public utilities to reclassify their electric plant accounts and to submit to the Commission certain statements showing pro forma a reclassification of their electric plant accounts in conformity with the provisions of said System of Accounts. Northwestern Company submitted such pro forma reclassification statements to the Commission on May 27, 1939. Such reclassification statements were investigated by representatives of the Commission, and a report thereon was issued under date of April 26, 1940, recommending certain adjustments in Northwestern Company's reclassification state- [1453] ments. After hearing on an order to show cause why Northwestern Com-

pany should not make such adjustments, the Commission, on December 6, 1940, issued its findings, opinion and order which ultimately were the subject of the opinion and judgment of this Court entered February 13, 1942 (125 F. 2d 882) affirming the Commission's order, except paragraph (2)(a) of said order, which directed that the $3,500,000 required to be transferred to Account 107, Electric Plant Adjustments, be disposed of by debits to surplus equaling each calendar year's net income, less preferred stock dividend appropriations, and with respect to which the Commission granted a rehearing, and except that part of paragraph (3) thereof which provided for the filing of certified copies of the journal entries required by said paragraph (2)(a).

V. American Company was authorized to intervene in such proceeding by order of the Commission entered January 28, 1941, and the rehearing granted by the Commission with respect to said paragraph (2)(a) was held before a Commission Examiner on March 3 and 4, 1941. Oral argument was had before the Commission en banc on May 21, 1941. The Commission's Order upon such rehearing, the review of which is here sought, was entered on April 14, 1942. It requires that:

"(A) Northwestern Electric Company make the following disposition of the amounts recorded in Account 107, Electric Plant Adjustments, as directed in this Commission's order of December 6, 1940:

For each year, commencing with the

calendar year 1940, it shall credit Account 107, Electric Plant Adjustments, and charge Account 414, Miscellaneous Debits to Surplus, with a sum equal to its Net Income (Account 400, Credit Balance Transferred from Income Account) less its Preferred Stock Dividend appropriations for each such calendar year until the amount of $3,500,000 shall have been entirely extinguished; [1454]

(B) Northwestern Electric Company file with the Commission certified copies of the journal entry required by paragraph (A) above, on or before June 1, 1942, and on April 1 of each year thereafter, as required."

Copy of the Commission's said Order of April 14, 1942 (including the Commission's Opinion No. 56-A incorporated therein by reference) is attached hereto as Exhibit A and made a part hereof.

VI. Petitioners, being aggrieved by said Order of April 14, 1942, filed with the Commission on May 11, 1942, pursuant to the provisions of Section 313(a) of the Act, an application for rehearing as to said Order. Copy of said application for rehearing is hereto attached as Exhibit B and made a part hereof.

VII. Counsel for the Petitioners were advised by the Commission, by letter over the signature of its Secretary dated May 22, 1942, that said appli-

cation for rehearing "cannot be accepted for filing by the Commission since the Commission's Opinion No. 56-A and Order thereon were issued upon a previous rehearing held in this matter", and such written advice is tantamount to the denial of said application for rehearing by the Commission. However, in any event, as of the date of filing of this petition, which is more than thirty days after said application for rehearing had been filed, the Commission has not otherwise acted upon such application and, therefore, pursuant to the provisions of Section 313(a) of the Act, such application is deemed to have been denied.

VIII. Petitioners aver that said Order of the Commission dated April 14, 1942 (hereinafter sometimes referred to as the "Order") is unreasonable, arbitrary, and contrary to law or without authority in law, in the following particulars and for the following reasons: [1455]

1. The Commission erred:

(a) In approving the ruling of its Examiner, at the rehearing held in this matter on March 3 and 4, 1941, rejecting evidence with respect to (i) the fair value of the properties and business of Northwestern Company as of the time when American Company, an innocent purchaser without notice of any infirmity, acquired the Common Stock of Northwestern Company; and (ii) the present fair value of such properties and business of Northwestern Company offered on behalf of both Northwestern Company and American Company: (1) as

to net income available for dividends on Northwestern Company's capital stock for the years 1922 to 1940 (Ex. No. 79; R. 1225-1236); (2) as to Northwestern Company's income and earned surplus for the twelve months ended December 31, 1940 (Ex. No. 80; R. 1236-1239); (3) as to the average price per kilowatt hour received by Northwestern Company from its residential customers, for the years 1922 to 1940, compared with the national average for the same period (Ex. No. 85; R. 1246-1249); (4) as to the average consumption of kilowatt hours by residential customers of Northwestern Company, for the years 1922 to 1940, compared with the national average for the same period (Ex. No. 86; R. 1249-1250); and (5) as to the reproduction cost of the property of Northwestern Company as of December 31, 1924, December 31, 1932, December 31, 1935 and June 30, 1940 (R. 1259-1571);

(b) In holding that such evidence was irrelevant and immaterial to the issues of the rehearing; and

(c) In failing to give any weight or consideration to other evidence with respect to the value of the properties and business of Northwestern Company, including evidence as to market quotations of the Common Stock of Northwestern Company and as to the cost of construction of the properties of Northwestern Company as contrasted with the truncated and incomplete original cost thereof required to be

recorded on Northwestern Company's books of account pursuant to the Commission's order of December 6, 1940 [1456]

2. The Commission erred in failing to find that American Company was an innocent purchaser for value of the Common Stock of Northwestern Company, and in disregarding or failing to consider the property rights so acquired by American Company or to consider evidence as to the substantial value of such Common Stock in the hands of American Company both at the time of its acquisition and at the time of the rehearing in this proceeding.

3. The Commission erred in holding that the amount of $3,500,000 under consideration "must be disposed of if sound accounting practices are to prevail". In this connection, the Petitioners respectfully urge that, even though no contention was made (R. 1313) that Northwestern Company received either cash or physical property for any of its Common Stock, the Company did receive from its organizers, in consideration for such Common Stock, services of very real value which put the Company in readiness to do business as a successful going concern, and that the Commission cannot accomplish anything "necessary or appropriate for purposes of administration" of the Act by requiring the writing-off of this particular asset account that could not be accomplished equally well by requiring the intangible character of this asset to be identi-

fied and segregated on the Company's books. If the Commission's purpose is to determine original cost, perhaps pursuant to the provisions of Section 208 of the Act, that objective will be realized by requiring a segregated statement, on the Company's books, of what the Commission conceives to be such original cost.

The Commission has gone far beyond such a conceivably legitimate exercise of its regulatory authority to the usurpation and arrogation of judicial powers (both of the federal courts and of the state courts) which the Congress obviously did not confer or intend to confer upon it. "Sound accounting practices" presumably require recognition of property rights established pursuant to the law of the land.

4. The Commission erred in disregarding the substantial and only available evidence introduced by Northwestern Company, pursuant to the requirements of Electric Plant Instruction 3-D of the Commission's "Uniform System of Accounts", with respect to the [1457] cash value of the Common Stock issued to Northwestern Company's organizers, said stock having been the consideration given for the organizers' services and other intangibles. To require more conclusive evidence of the precise value of said stock on the specific date of its issuance is to impose upon Northwestern Company an impossible burden of proof, and

to disregard said evidence is to deprive Northwestern Company and its security holders of its and their property without due process of law.

5. The Commission erred in ordering the $3,500,000 here under consideration to be disposed of by debits to surplus equaling each year's net income, less preferred stock dividend appropriations. In this connection, the Petitioners urge that this required disposition: (a) is unreasonable and arbitrary, is not consistent with the public interest and is contrary to the best interests of investors in and the consumers of Northwestern Company; (b) ignores Northwestern Company's substantial existing surplus and provides for a capricious and arbitrary "write-off" or amortization schedule wholly lacking any factual basis; (c) unreasonably and arbitrarily jeopardizes future dividends upon Northwestern Company's preferred stock, for the reason that, if, as the Commission's Order assumes, book records established in accordance with the Commission's "Uniform System of Accounts" are to become the sole criterion both of cost and of value, not only for purposes of rate regulation, but also for corporate purposes generally, including dividend determinations, and if, measured by any such Commission yard-stick, Northwestern Company's capital were, in fact, "impaired," so as thereby to necessitate the cessation of common stock dividends, such

"impairment" would also prevent the payment of preferred stock dividends; (d) represents the purported exercise of powers which are not granted to the Commission by the Act; (e) invades powers reserved to the states by the provisions of the Act and by Article X of the Amendments to the Constitution of the United States; (f) is not supported by substantial or any evidence and is, in this as in other respects, arbitrary and capricious; (g) rests upon the assumption that the $3,500,000 which now represents the Common Stock of [1458] Northwestern Company must be attributed entirely to the electrical facilities, operations and values of Northwestern Company, without consideration of its non-electrical properties, operations and values, over which the Commission has no jurisdiction, such assumption doing violence to the facts and not being supported by substantial or by any evidence; and (h) requires the writing-off on Northwestern Company's books of definite values inherent in the presently recorded cost of its property without regard to the opinion of this Court herein (125 F. 2d 882, 886) that the "system of accounts takes nothing" from Northwestern Company, and that the "present regulation only requires a particular system of accounts to be kept, not that other systems shall not be kept."

6. The Commission's Order further is arbi-

trary and unreasonable in that it requires the amortization of said amount of $3,500,000 out of Northwestern Company's net income, less its preferred stock dividend appropriations, and thus is inconsistent with the Commission's opinion, which contemplates that provision shall be made for the Company's preferred stock dividend requirements before the amortization formula is applied.

7. The Commission's Order, in its entirety: (a) is based upon a mistake of law arising out of the Commission's misconstruction of the statute under which it purports to act; (b) assumes to exercise powers not granted, or conceivably intended to be granted, to the Commission by the Congress; and (c) is contrary to the express provisions of the Act, particularly Sections 19, 20, 201, 207, 301(a) and 318 thereof, which limit the jurisdiction of the Commission. In this connection, the Petitioners respectfully urge that Northwestern Company is a corporation organized and existing under the laws of the state of Washington; that the courts of that state alone have jurisdiction to determine the validity of the issuance of the capital stock of Washington corporations and the adequacy of the consideration received therefor, or to take action to enforce payment of an allegedly unpaid stock subscription; that the rights of American Company as the holder of 100,000

shares of the validly-issued, fully-paid and non-assessable Common Stock of Northwestern Company have been determined by a court of competent juris- [1459] diction of the state of Washington (Ex. No. 89, R. 1285-1292); and that neither Northwestern Company nor any security holder thereof could successfully attack the validity of Northwestern Company's Common Stock in the hands of American Company, which was and is an innocent purchaser thereof for value.

8. The Commission's Order is erroneous and is beyond the authority conferred upon the Commission by the Act in that such Order requires an enforced additional investment of $3,500,000 by American Company in the Common Stock of Northwestern Company, for which American Company has already paid $5,021,799.33 (R. 1274).

9. The Commission's Order is based upon a mistake of law in that the Commission attempts retrospectively to apply the provisions of the Act and the regulatory powers therein granted. The Act does not provide for or authorize any such retrospective application and does not authorize or contemplate the issuance of an order to write off book capital which, at the time, is represented by assets of equivalent value.

10. The Commission erred in holding that its disposition order does not deprive Northwestern Company and the holders of its securi-

ties of its and their property without due process and does not take its and their property without just compensation.

11. The effect of the Commission's Order is to determine, and deprive the Petitioners of, vested property rights. The Petitioners were and are entitled at least to an independent judicial review of such administrative determination as to both facts and law, and Section 313 (b) of the Act, to the extent that it does not grant such independent judicial review as to facts, is unconstitutional as depriving Petitioners of their property without due process.

12. The Commission's Opinion and Order erroneously assume that the issue is whether the Company's property accounts "can be written up at will so long as it is able to support such manipulation by evidence of present fair value." The only revision in Northwestern Company's plant account made subsequent to its organization period was a revision downward by $6,500,000, effected on the basis of a careful appraisal [1460] by a thoroughly qualified independent engineer. This reorganization was consummated pursuant to authority conferred upon the officers of the Company by its stockholders and directors (R. 1316-1322), and was required to be predicated upon the then fair value of the Company's assets. After this reorganization had been effected, the officers of Northwestern Company believed that its bal-

ance sheet conservatively represented values which were inherent in the Company's property.

In this connection, Petitioners respectfully urge that the Commission may not, "within the ambit of its statutory authority", require a reorganization of the capital structure of Northwestern Company or disregard the present fair value of property represented by an asset account and require such account to be written off by debits to surplus, thus directing Northwestern Company to write off from its book values a loss which it has not sustained, and, in effect, determining (a) that the Common Stock of Northwestern Company has not been lawfully issued for what the Commission deems to be adequate consideration, (b) that such stock is not valid in the hands of an innocent purchaser for value, and (c) that such innocent purchaser for value shall contribute the full par value of such stock.

IX. The said Order of the Commission violates, especially in the particulars hereinbefore set forth, Articles V and X of the Amendments to the Constitution of the United States, deprives the Petitioners of property without due process of law, and takes such property for public use without just compensation.

X. By order entered May 26, 1942, the Commission extended from June 1, 1942 until June 30, 1942, its requirement that Northwestern Company file a

copy of the journal entry provided for in paragraph (B) of the Commission's Order of April 14, 1942 (pp. 4-5, supra), and Petitioners respectfully submit that Northwestern Company should not be required, during the pendency of the appeal effected by this petition for review, to make the accounting adjustments required by paragraph (A) of said Order of [1461] to file a copy or copies of the journal entry provided for in said paragraph (B) thereof, or otherwise to disturb its status quo. In this connection, Petitioners submit that if Northwestern Company complies with the Commission's Order, the questions raised in this petition for review may become moot, thus denying Petitioners the right of judicial review provided for in Section 313 of the Act. Furthermore, such adjustments or journal entry may not be considered to be definitive for any purpose, nor may any determination or order of the Commission be based thereon, prior to this Court's determination of the issues herein, without denying to Petitioners the right of judicial review provided for in said Section 313 of the Act. On the other hand, if Northwestern Company fails and refuses to comply with the provisions of the Commission's Order of April 14, 1942, both Northwestern Company and its officers may become subject to the fines, penalties and forfeitures prescribed by Sections 315 and 316 of the Act.

XI. Neither the public interest nor the interests of investors or consumers could conceivably be adversely affected by a stay of the Commission's re-

quirements in this respect, because, if the Commission's Order of April 14, 1942, is sustained by this Court, Northwestern Company can and will be required to make, nunc pro tunc, said accounting adjustments and journal entry and to file certified copies of said journal entry, as the Commission has required. If such accounting adjustments and journal entry could be made on June 30, 1942, as of December 31, 1940, and for each succeeding calendar year, they obviously may be made with equal propriety, if required to be made at all, after the determination of the issues raised in this petition for review.

Wherefore, Petitioners pray that said Order of the Federal Power Commission, dated April 14, 1942, and said Commission's denial of Petitioners' said application for rehearing filed on May 11, 1942, be reviewed by this [1462] Honorable Court; that this Court grant forthwith a stay of the Commission's said Order pending the determination of the issues raised in this petition for review; and that, upon such determination, this Court enter its judgment or decree wholly setting aside or annulling said Order of the Commission and granting to Petitioners and each of them such other and further relief as may be just and proper in the premises.

Respectfully submitted,

NORTHWESTERN ELECTRIC COMPANY,

By L. T. MERWIN,

President.

AMERICAN POWER & LIGHT COMPANY,
By L. H. PARKHURST,
Vice-President.
JOHN A. LAING,
HENRY S. GRAY,
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Two Rector Street,
New York, New York,
Attorneys for both Petitioners
LAING GRAY & SMITH
Portland, Oregon.
REID & PRIEST
New York, New York,
Of Counsel. [1463]

State of Oregon,
County of Multnomah—ss.

I, L. T. Merwin, being first duly sworn, depose and say that I am the President of Northwestern Electric Company, one of the Petitioners herein; that I have read the foregoing Petition and know the contents thereof, and that the same is true to the best of my knowledge and belief.

L. T. MERWIN.

Subscribed and sworn to before me this ....day of June, 1942.

[Seal] JEAN McGILCHRIST,
Notary Public for Oregon.

My Commission Expires August 2, 1944.

State of New York,
County of New York—ss.

I, L. H. Parkhurst, being first duly sworn, depose and say that I am the Vice-President of American Power & Light Company, one of the Petitioners herein; that I have read the foregoing Petition and know the contents thereof, and that the same is true to the best of my knowledge and belief.

L. H. PARKHURST.

Subscribed and sworn to before me this 4th day of June, 1942.

[Seal] FLORENCE O. DEMO,
Notary Public, Bronx County
Bronx Co. Clk's No. 26;
Reg. No. 37-D-44, N. Y. Co.
Clk's No. 140, Reg. No. 4-
D-72.

Commission Expires March 30, 1944.

[Endorsed]: Filed Jan. 12, 1942. [1464]

[Title of Circuit Court of Appeals and Cause.]

STIPULATION AND ORDER STAYING PROCEEDINGS

It is hereby stipulated and agreed that, upon the motion of Messrs. John A. Laing and Henry S.

Gray, Attorneys for Petitioner, Northwestern Electric Company, and A. J. G. Priest and Sidman I. Barber, Attorneys for both Petitioners, an Order in the following terms may be entered in the above entitled proceeding:

Upon the written motion of Messrs. John A. Laing and Henry S. Gray, Attorneys for Petitioner, Northwestern Electric Company, and A. J. G. Priest and Sidman I. Barber, Attorneys for both Petitioners, and the Stipulation of said Attorneys for Petitioners, and Mr. Richard J. Connor, General Counsel for the Respondent, and it appearing to the Court that no harm can result to any party or to the public interest therefrom, and good cause therefor appearing,

It Is Ordered that the Order of the Federal Power Commission, dated April 14, 1942 in that certain proceeding before the said Commission entitled In the Matter of Northwestern Electric Company and docketed as Docket No. IT-5642, being the Order of the said Commission for the review of which a petition was filed in this Court on June 12, 1942 by the said Northwestern Electric Company and American Power & Light Company, be and hereby is stayed during the pendency of the proceedings commenced by the filing of the said petition for review thereof and to and including the issuance of the certified copy of the judgment or decree of this Court herein, if said Order shall not have been set aside in whole by the judgment or decree

of this Court; provided, however, that during the period [1465] of the stay granted hereby, the said Northwestern Electric Company shall not declare or pay any dividends upon any shares of its common stock or make any other distribution on any shares of its common stock except as might lawfully be declared and paid after fulfilling the requirements of the provisions of paragraph (A) of said Order of April 14, 1942.

JOHN A. LAING
HENRY S. GRAY,
Attorneys for Petitioner, Northwestern Electric Company.

A. J. G. PRIEST
SIDMAN I. BARBER,
Attorneys for both Petitioners
RICHARD J. CONNOR,
General Counsel for the Respondent.

Dated: June 22, 1942.

So Ordered.

June 17, 1942.

FRANCIS A. GARRECHT,
CURTIS D. WILBUR,
WILLIAM DENMAN,
United States Circuit Judges.

[Endorsed]: Filed Jan. 22, 1942. [1466]

[Endorsed]: No. 10161. United States Circuit Court of Appeals for the Ninth Circuit. Northwestern Electric Company and American Power & Light Company, Petitioners, vs. Federal Power Commission, Respondent. Transcript of the Record. Upon Petition to Review an Order of the Federal Power Commission.

Filed, July 27, 1942.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10161

NORTHWESTERN ELECTRIC COMPANY, and AMERICAN POWER & LIGHT COMPANY,
Petitioners,

vs.

FEDERAL POWER COMMISSION,
Respondent.

PETITIONERS' STATEMENT OF POINTS

Come now Northwestern Electric Company and American Power & Light Company, petitioners in the above-entitled cause, and adopt the assignments of error as set forth in paragraphs VIII and IX of their Petition for Review, filed herein on June 12,

1942, as their Statement of the Points on which petitioners intend to rely on the review in said cause.

Dated this 30th day of July, 1942.

JOHN A. LAING
HENRY S. GRAY
Public Service Building
Portland, Oregon
A. J. S. PRIEST
SIDMAN I. BARBER
2 Rector Street
New York, N. Y.
Attorneys for Petitioner, Northwestern Electric Company.
A. J. S. PRIEST
SIDMAN I. BARBER
Attorneys for Petitioner, American Power & Light Company

LAING, GRAY & SMITH
Portland, Oregon
REID & PRIEST
New York, New York
Of Counsel.

CERTIFICATE OF SERVICE

I hereby certify that on July 30, 1942, I served the foregoing document, entitled "Petitioners' Statement of Points", upon the Federal Power Commission, by mailing a copy thereof, properly addressed, postage prepaid, to George Slaff Esquire, principal attorney for the Federal Power Commission.

Dated at Portland, Oregon, this 30th day of July, 1942.

JOHN A. LAING
Of Attorneys for Northwestern
Electric Company, Petitioner.

[Endorsed]: Filed Jul. 31, 1942.